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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHERN ILLINOIS GAS COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. May petitioner's utility trucks be taxed as "truck-trailer combinations" if trailers are not customarily used with that type of truck, where the federal Highway Use Tax statute includes trailers in the taxing formula only if trailers are "customarily used" with the type of truck in question?

2. May the Internal Revenue Service ("IRS") make or change rules, pursuant to legislative rule-making authority expressly delegated by Congress under the Highway Use Tax statute, without complying with the notice and hearing requirements of the Administrative Procedure Act?

There is a clear conflict among the Circuits on the first question. Nearly every utility company in the United States is affected, and over 250 cases are pending in the District Courts or at administrative levels within the IRS.

PARTIES

The caption of the case in this Court lists all parties. The following is a listing of parent companies, subsidiaries (other than wholly-owned subsidiaries) and affiliates in accordance with Rule 28.1: petitioner Northern Illinois Gas Company is a subsidiary of NICOR, Inc., a publicly-held company.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Parties	ii
Opinions Below	1
Jurisdiction	2
Statutes and Regulations Involved	2
Statement of the Case	2
Reasons for Granting the Petition	5
A. The Seventh And Eighth Circuits Are In Conflict With The Ninth Circuit And The United States Claims Court	5
B. Nearly Every Utility In The United States Has A Case Or Audit Pending, And Many Millions of Dollars In Revenue Are Affected By the Present Case	8
C. The Seventh Circuit's Decision Conflicts With The Unambiguous Language Of The Highway Use Tax Statute And Should Be Reversed	10
D. The Seventh Circuit's Decision That Revenue Ruling 76-294 Does Not Constitute Legislative Rule-Making Subject To The Administrative Procedure Act Conflicts With This Court's Decision in *Batterton* v. *Francis*, 432 U.S. 416 (1977).	12
Conclusion	17

TABLE OF AUTHORITIES

Cases

	PAGE
American Standard, Inc. v. *United States,* 602 F.2d 256 (Ct. Cl. 1979)	14
Batterton v. *Francis,* 432 U.S. 416 (1977)	12, 13, 14, 16
Batterton v. *Marshall,* 648 F.2d 694 (D.C. Cir. 1980)	16
Chevron, U.S.A., Inc. v. *National Resources Defense Council, Inc.,* ____ U.S. ____, 52 U.S.L.W. 4845 (1984)	13
Chrysler Corp. v. *Brown,* 441 U.S. 281 (1979)	13
General Electric Co. v. *Gilbert,* 429 U.S. 125 (1976)	13
Heiner v. *Donnan,* 285 U.S. 312 (1932)	7
International Brotherhood of Teamsters v. *Daniel,* 439 U.S. 551 (1979)	11
Kansas City Power & Light Co. v. *United States,* No. 230-82T (Cl. Ct. November 21, 1984)	7
Koshland v. *Helvering,* 298 U.S. 441 (1936)	10
Lewis-Mota v. *Secretary of Labor,* 469 F.2d 478 (2d Cir. 1972)	13
L.E. Myers Co. v. *United States,* No. 362-79T (Cl. Ct. November 21, 1984)	7
Manhattan General Equipment Co. v. *Commissioner,* 297 U.S. 129 (1936)	11
Minnesota Power & Light Co. v. *United States,* ____ F. Supp. ____, 6 Cl. Ct. 558 (1984)	6, 7, 8, 15
National Muffler Dealers Association v. *United States,* 440 U.S. 472 (1979)	11
Northern States Power Co. v. *United States,* 663 F.2d 55 (8th Cir. 1981), *cert. denied,* 456 U.S. 965 (1982)	7, 8, 10
Northern States Power Co. v. *United States,* 503 F. Supp. 1182 (D. Minn. 1981)	8

PAGE

Pacific Gas and Electric Co. v. *United States*, 664 F.2d 1133 (9th Cir. 1981), *on remand* 554 F. Supp. 345 (N.D. Cal. 1983) 5, 6, 8, 10

Public Service Co. of Colorado v. *United States*, ____ F. Supp. ____, CCH Federal Excise Tax Rptr. ¶ 16,428 (D. Col. 1984) 8

Public Service Co. of Colorado v. *United States*, No. 80-M-660 (D. Col. October 25, 1982) 8

Reynolds Metal Co. v. *Rumsfeld*, 564 F.2d 663 (4th Cir. 1977) 13

Rowan Companies, Inc. v. *United States*, 452 U.S. 247 (1981) 11, 13

Standard Oil Co. v. *Department of Energy*, 596 F.2d 1029 (T.E.C.A. 1978) 13

Texaco, Inc. v. *Federal Power Commission*, 412 F.2d 740 (3d Cir. 1969) 13

United States v. *Vogel Fertilizer Co.*, 455 U.S. 16 (1982) 11

Statutes and Regulations

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2101(c) 2

26 U.S.C. § 4481(a) 2, 8, 10, 15

26 U.S.C. § 4482(b) 2, 3, 8, 10, 13, 15

26 U.S.C. § 4482(c)(5) 9

5 U.S.C. § 551 2

5 U.S.C. § 553 ..... 3, 12

5 U.S.C. § 706 12

26 C.F.R. § 41.4482(a)-1(b) 2, 3, 7, 15

26 C.F.R. § 41.4482(b)-1(a) 2, 3, 15

26 C.F.R. § 41.4482(b)-1(d) 2, 3

PAGE

Miscellaneous

Pub. L. No. 97-424, 97th Cong., 2d Sess. § 513(c) (1983) 9

Pub. L. No. 98-369, 98th Cong., 2d Sess. § 734(h) (1984) 9

H.R. Rep. No. 2022, 84th Cong., 2d Sess. 62 (1956) 14

S.Rep. No. 2054, 84th Cong., 2d Sess. 29 (1956) ... 14

H.R. Rep. No. 98-432, 98th Cong., 2d Sess. 1651 (1984) 9

Revenue Ruling 76-294, 1976-2 C.B. 364 ..... 4, 12, 15

Revenue Ruling 60-260, 1960-2 C.B. 347 4

Revenue Ruling 72-109, 1972-1 C.B. 351 4

Revenue Ruling 74-426, 1974-2 C.B. 375 4

Revenue Ruling 74-539, 1974-2 C.B. 376 4

Revenue Ruling 78-156, 1978-1 C.B. 365 4

General Counsel's Memorandum 38962 (February 16, 1983), CCH *IRS Positions* ¶ 1164 ..... 4, 15

General Counsel's Memorandum 30742 (June 19, 1958) 4, 15

General Counsel's Memorandum 32881 (July 20, 1964) 4

General Counsel's Memorandum 34603 (September 9, 1971) 4

General Counsel's Memorandum 35261 (March 7, 1973) 4

General Counsel's Memorandum 35262 (March 7, 1973) 4

General Counsel's Memorandum 35826 (May 20, 1974) 4

PAGE

General Counsel's Memorandum 36241 (April 18, 1975) 4

General Counsel's Memorandum 37339 (December 2, 1977) 4

General Counsel's Memorandum 37463 (March 16, 1978) 4

Davis, *Administrative Law Treatise* §§ 7:8 and 7:15 (1979 and 1982 Supp.) 13

Letter of March 2, 1983 to Sharon L. King, Esq., from Dan Rostenkowski, Chairman of The Ways and Means Committee, United States House of Representatives 9

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Northern Illinois Gas Company ("NI-Gas"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on September 10, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 743 F.2d 539 and appears in the Appendix hereto at pages 1a to 12a. The opinions of the United States District Court for the Northern District of Illinois are officially reported at 554 F. Supp. 371, reconsideration denied and judgment amended, 560 F. Supp. 928, and appear in the Appendix at pages 16a to 24a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 10, 1984. NI-Gas' petition for rehearing en banc was denied on December 10, 1984. (Pet. App. 15a). This petition is filed within 90 days of the denial of rehearing pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTES AND REGULATIONS INVOLVED

The statutes involved are the Administrative Procedure Act of 1946, 5 U.S.C. §§ 551 *et seq.* (1946), and the Highway Use Tax, 26 U.S.C. §§ 4481-4484 (1956). Also involved are regulations under the Highway Use Tax, 26 C.F.R. §§ 41.4482(a)-1(b), 41.4482(b)-1(a) and 41.4482(b)-1(d) (1956). In accordance with Rule 21.1(f), these provisions are set out verbatim in the Appendix at pages 25a to 29a.

STATEMENT OF THE CASE

1. *The Facts and The Statute.* Petitioner NI-Gas is a regulated public utility in Illinois. Its all-purpose utility trucks are equipped with trailer hitches known as "pintle hooks." This type of truck is used for many purposes in the utility industry and is not customarily used with trailers.[1] A photograph of this type of truck is included at Pet. App. 63a.

The tax base of the federal Highway Use Tax is the "taxable gross weight" of motor vehicles which use the public highways. This taxable gross weight includes the weight of the vehicle, plus

> "... the semitrailers and trailers (fully equipped for service) customarily used in connection with highway motor

[1] In the District Court, NI-Gas offered undisputed evidence that this type of truck is used with trailers during only 25 percent of operating time, based on a seven-state survey of utility companies. The United States did not challenge this evidence except as to relevance. The District Court concluded that the evidence was irrelevant. (*See* Pet. App. 17a note 2).

> vehicles of the same type as such highway motor vehicle . . ." 26 U.S.C. § 4482(b)(1)(B) (1956). (Pet. App. 28a).

The crux of this case is the meaning of this "customary use" standard for including trailers in the taxable gross weight of trucks, and the substantive and procedural validity of an IRS rule that ignores this "customary use" standard.

NI-Gas classifies its all-purpose trucks as "single units." As "single units," the trucks are too light to be taxed under the Highway Use Tax. However, the IRS takes the position that this type of truck is a "truck-trailer combination" and therefore is taxable. The IRS rule is based on the presence of the pintle hook, without regard to actual use of trailers with this type of truck. The IRS has imposed this rule on all public utility companies without providing the notice and hearing required by the rule-making provisions of the Administrative Procedure Act, 5 U.S.C. § 553. (Pet. App. 25a-26a).

2. *The Treasury Department Regulations and IRS Rulings.* The Highway Use Tax statute expressly delegates rule-making authority for determining taxable gross weight to the Secretary of the Treasury in 26 U.S.C. § 4482(b) (1956). (Pet. App. 28a). In 1956, the Treasury Department promulgated regulations which, in prescribing the basic rules, twice repeat the "customary use" test. 26 C.F.R. §§ 41.4482(a)-1(b) and 41.4482(b)-1(a). (Pet. App. 28a). However, these regulations also include a Use Tax Schedule, which assigns taxable gross weights to three kinds of vehicles: single units, tractor-trailer combinations, and truck-trailer combinations. The descriptive categories in this table state that a truck is a single unit if "equipped for use as a single unit," but is a truck-trailer combination if "equipped for use in combinations." 26 C.F.R. § 41.4482(b)-1(d). (Pet. App. 29a). Therein lies the legal question: can trucks which are merely "equipped for use in combinations" be taxed as truck-trailer combinations if the type

of truck is not "customarily used" with trailers as contemplated by the statute?

In 1956 and for 20 years thereafter, the IRS agreed with NI-Gas that the statutory "customary use" rule is the governing test. At least nine General Counsel Memoranda and at least thirteen revenue rulings issued from 1957 to 1978 follow the "customary use" test of the statute rather than the "equipped for use in combinations" rule to determine whether particular types of trucks should be classified as truck-trailer combinations.[2] But in 1976, the IRS changed to the "equipped for use in combinations" rule to tax utility trucks equipped with pintle hooks. In Revenue Ruling 76-294, 1976-2 C.B. 364, the IRS ruled that utility trucks equipped with pintle hooks must be classified as "truck-trailer combinations" without regard to whether this type of truck is "customarily used" with trailers. None of the requirements of the Administrative Procedure Act were followed by the IRS in publishing Revenue Ruling 76-294. The IRS thereafter used the new "equipped for use in combinations" rule to tax utility trucks during audits and litigation.

3. *The Proceedings Below.* After an audit of NI-Gas for the twelve month periods ended on June 30 of 1972, 1973 and

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[2] The General Counsel Memoranda (G.C.M.), and the revenue rulings to which they relate, are as follows:

G.C.M.	Date	Revenue Ruling
30742	June 19, 1958	60-260
32881	July 20, 1964	(not given)
34603	September 9, 1971	72-109
35261	March 7, 1973	74-539
35262	March 7, 1973	74-426
35826	May 20, 1974	74-539
36241	April 18, 1975	76-294
37339	December 2, 1977	78-156
37463	March 16, 1978	(not given)

The G.C.M.s are currently not in the public domain, but are discussed in G.C.M. 38962 (February 16, 1983), published in CCH *IRS Positions* ¶ 1164.

1974, the IRS assessed an additional tax of $93,684.28 plus interest. NI-Gas paid $480.03, representing the tax on one truck, and filed a refund action in the United States District Court for the Northern District of Illinois. The United States counterclaimed for the balance of the assessment.

The District Court held for the United States, relying on "the discretion given to the Secretary of the Treasury and in view of necessary administrative ease." (Pet. App. 19a). The Court of Appeals affirmed by a two-to-one vote, finding that "the Secretary's 'equipped for use' standard is a reasonable implementation of the 'customarily used' standard contained in the statute." (Pet. App. 6a). The Court of Appeals recognized that prior decisions of the Eighth and Ninth Circuits were in conflict, and stated that "[a]lthough both the Eighth and Ninth Circuit positions are reasonable, we agree with the court below that the Eighth Circuit's is the preferred view." (Pet. App. 5a). The Court of Appeals also found that Revenue Ruling 76-294 was valid as an interpretative rule exempt from the notice and hearing requirements of the Administrative Procedure Act. (Pet. App. 4a, note 3).

Judge Pell dissented, stating that the "equipped for use" rule "disregards the customary-use test set forth in the statute." He added that "[i]n my opinion the Ninth Circuit correctly resolved the issue in *Pacific Gas and Electric Co. v. United States,* 664 F.2d 1133 (9th Cir. 1981)." (Pet. App. 8a).

REASONS FOR GRANTING THE PETITION

A. The Seventh and Eighth Circuits Are In Conflict With The Ninth Circuit And The United States Claims Court

The lower courts are in conflict on the issue of statutory interpretation presented in this case. The Ninth Circuit decided the same issue in favor of the taxpayer in *Pacific Gas and Electric Co.* v. *United States,* 664 F.2d 1133 (9th Cir. 1981), *on remand* 554 F. Supp. 345 (N.D. Cal. 1983). In that case, the

Ninth Circuit refused to accept the IRS' disregard of the unambiguous "customary use" language in the Highway Use Tax statute:

> "The statute and the regulations make it clear that trailers are only to be included in the gross taxable weight of the truck if that type of trailer is customarily used with such type truck. Hence, the requirement of such 'customary use' set forth in the statute and the regulations requires a factual determination of whether the type trailer is customarily used in connection with a motor vehicle of the same type as the motor vehicle (truck) of Pacific, rather than an arbitrary finding that any truck equipped with a pintle hook is one customarily so used in combination . . .
>
> An interpretation of the statute or regulations which permits the Internal Revenue Service to classify a vehicle as a 'truck trailer' combination merely because the vehicle is 'equipped for use in combination' with trailers, such as equipped with a pintle hook, without first determining that such trailer or semitrailer is the type customarily used in combination with such vehicle is erroneous and any regulation permitting the same is contrary to the statute and therefore invalid and of no effect." 664 F.2d at 1135-1136.

The Ninth Circuit emphasized that, if the "equipped for use in combinations" rule is applied without a "customary use" determination, then "[s]uch interpretation is inconsistent with the unambiguous provisions of the statute." 664 F.2d at 1135.

The Ninth Circuit's decision in the taxpayer's favor is supported by the thoroughly reasoned opinion of the United States Claims Court in *Minnesota Power & Light Co.* v. *United States*, ____ F. Supp. ____, 6 Cl. Ct. 558 (1984), which is reproduced for the convenience of the Court at Pet. App. 31a. That case was decided after the Seventh Circuit's decision here, and the Claims Court explicitly adopted the position of the Ninth Circuit and Judge Pell's dissent below. The Claims Court also explained that the "customary use" rule is fundamental to the logic of the statute:

> ". . . the focus of the highway use tax is squarely upon the assumed weight of the vehicle, and, as such, only trailers

> which are customarily towed by such trucks can logically be combined with the weight of the trucks themselves. This interpretation of the highway use tax is confirmed by the Treasury Regulations which expressly state that 'the base of the tax' is the gross weight of the vehicle, not the weight of the trailer, and that the weight of the trailer is only included in the gross weight of the vehicle when the trailer is customarily used in combination with that particular type of highway motor vehicle. 26 C.F.R. § 41.4482(a)-1(b)." 6 Cl. Ct. at 563; Pet. App. 41a.

The Claims Court further demonstrated that the "customary use" rule was adopted by the IRS in 1956 and was consistently applied for 20 years in IRS revenue rulings and General Counsel Memoranda. This longstanding acceptance by the IRS of the "customary use" rule was held to "constitute 'a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent' " which was entitled to "particular force". 6 Cl. Ct. at 567; Pet. App. 50a. The Claims Court also found that the IRS' "equipped for use in combinations" rule creates a forbidden irrebutable presumption of "customary use", quoting this Court's statement in *Heiner* v. *Donnan,* 285 U.S. 312, 325 (1932), that "a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the [Fifth] Amendment." 6 Cl. Ct. at 573; Pet. App. 60a. *See also* the companion cases of *L.E. Myers Co.* v. *United States,* No. 362-79T (Cl. Ct. November 21, 1984) and *Kansas City Power & Light Co.* v. *United States,* No. 230-82T (Cl. Ct. November 21, 1984), each of which reached an identical result and conflict directly with the Seventh Circuit's decision here.

Contrary to these well-reasoned opinions by the Ninth Circuit and Claims Court — and Judge Pell's cogent dissent in the Seventh Circuit — are the opinions of the Seventh Circuit, the Eighth Circuit, and the United States District Court for the District of Colorado. *Northern States Power Co.* v. *United States,* 663 F.2d 55 (8th Cir. 1981), *cert. denied,* 456 U.S. 965

(1982); *Public Service Co. of Colorado* v. *United States,* ____ F. Supp. ____, CCH Federal Excise Tax Rptr. ¶ 16,428 (D. Col. 1984); *Public Service Co. of Colorado* v. *United States,* No. 80-M-660 (D. Col. October 25, 1982).

In the *Northern States Power* case, the Eighth Circuit simply held that "the IRS assessment of the vehicles as [truck]-trailer combinations is consistent with the language of sections 4481 and 4482 of the Code and their corresponding regulations" and, with no further analysis, affirmed the District Court. 663 F.2d at 57. The District Court had relied upon the lower court decision in the *Pacific Gas and Electric* case, which subsequently was reversed on appeal by the Ninth Circuit. *Northern States Power Co.* v. *United States,* 503 F. Supp. 1182, 1183 (D. Minn. 1981). The opinions of the Ninth Circuit and the Claims Court are far more thorough than these conflicting decisions, and reach the correct conclusion that the "customary use" standard cannot be read out of the Highway Use Tax statute.

Justice Blackmun and Justice White would have granted certiorari in the *Northern States Power* case, presumably to resolve the conflict in the Circuits at an early stage. The conflict now has spread across the nation, producing different rulings in the construction of the Highway Use Tax statute in different sections of the country, and making a taxpayer's liability depend solely upon its geographical location.

B. Nearly Every Utility In The United States Has A Case Or Audit Pending, And Many Millions Of Dollars In Revenue Are Affected By the Present Case

Nearly every utility company in the United States is affected by the issue presented in this case. Taxpayers have filed cases, or are expected to file cases, in many of the United States District Courts. The Claims Court stated in the *Minnesota Power* case that 262 cases are pending at the IRS administrative level alone. 6 Cl. Ct. at 573-574; Pet. App. 62a.

Significant taxes and interest are at stake because the issue applies to all open taxable years up to June 30, 1984.[3] For example, NI-Gas has at stake $93,684.28 (plus interest) for just the first three of its thirteen open taxable years affected by this case. Since the taxes at stake to a great extent would be passed through to the regulated utility companies' ratepayers in the form of higher utility bills, most people in the United States have an indirect interest in this case.

If the conflict in the lower courts persists, some taxpayers will bear the tax and others will not, depending upon their geographical location and their ability to choose the forum of litigation. An equally unfortunate result would be the waste of the resources of the lower courts, the taxpayers, and the IRS in fighting this battle through every Circuit Court of Appeals. As Judge Pell correctly observed in his dissent below:

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[3] At the urging of the Treasury Department, in January of 1983 Congress adopted the "equipped for use" rule on a prospective basis, effective July 1, 1984. 26 U.S.C. § 4482(c)(5), enacted by Pub. L. No. 97-424, 97th Cong., 2d Sess. § 513(c)(1983). Subsequently, the Tax Reform Act of 1984, Pub. L. No. 98-369, 98th Cong., 2d Sess. § 734(h) (1984), made it clear that "no inference for past periods [is] to be drawn from [the 1983] amendment relating to customary use of trailers." See also H.R. Rep. No. 98-432, 98th Cong., 2d Sess. 1651 (1984) (explaining that no inferences are to be drawn "with respect to the taxation of trailers based upon their 'customary use' for periods before the effective date of these amendments"). In addition, Dan Rostenkowski, Chairman of the House Ways and Means Committee, stated shortly after the enactment of the 1983 legislation that "the Committee's staff has discussed this matter with the I.R.S. and has emphasized that it was not the Committee's intention to influence the outcome of ongoing litigation." Letter of March 2, 1983 to Sharon L. King, Esq., from Dan Rostenkowski, Chairman of the Ways and Means Committee, United States House of Representatives, reproduced at Pet. App. 30a. Therefore, the 1983 amendment clearly does not affect any of the hundreds of pending cases, including this case, which are subject to conflicting appellate court rulings.

> "I find it disturbing that this case manifests another example of the apparent disinclination of the tax collecting authorities to put a hand on the oar in the interest of promoting national uniformity and coherence in the application of the federal tax laws.... The Government, of course, had no basis for endeavoring to have the Supreme Court review the *Northern States Power* decision. But a month later a square conflict among the circuits was created by *Pacific Gas*. The Government thereupon apparently was willing to forego this silver tray opportunity to seek finality on the troublesome issues presented, and, thereby to seek consistent national construction of the statute." (Pet. App. 11a).

National uniformity in sharing the burden of this substantial tax is essential to serve Congress' objective, and a decision by this Court would prevent a significant waste of the nation's legal resources.

C. The Seventh Circuit's Decision Conflicts With the Unambiguous Language Of The Highway Use Tax Statute And Should Be Reversed

The IRS' current "equipped for use in combinations" interpretation, sustained by the panel below, cannot be reconciled with the plain language used by Congress in the statute. In both Sections 4481 and 4482 of the statute, Congress expressed its intention that trailers used with trucks would be included in weight calculations *only* to the extent that such trailers are "customarily used in connection with highway motor vehicles" of the type in question. (Pet. App. 27a-28a). Where, as here, such trailers are used infrequently—rather than customarily—by utility companies operating such trucks, the literal language of the statute is contravened by an administrative interpretation which includes phantom trailer weight in the tax calculation.

This Court consistently has held that in cases where the "provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation." *Koshland* v. *Helvering,* 298 U.S. 441, 447 (1936). And where a rule or regulation "operates to create a rule out of harmony with the

statute, [it] is a mere nullity." *Manhattan General Equipment Co.* v. *Commissioner,* 297 U.S. 129, 134 (1936). Thus, in *United States* v. *Vogel Fertilizer Co.,* 455 U.S. 16, 25 (1982), this Court held invalid a Treasury Department regulation defining a statutory term where the statutory language "is in closer harmony with the taxpayer's interpretation than with the Commissioner's regulation." And in *Rowan Companies, Inc.* v. *United States,* 452 U.S. 247, 253 (1981), this Court invalidated Treasury Department regulations defining a statutory term, even though they had been in effect since 1940, because they "fail[ed] to implement the congressional mandate in a consistent and reasonable manner."[4]

As previously noted, the IRS fully recognized that the statute meant exactly what it said when it originally construed the statute to focus on actual customary use. The IRS' original view, maintained over a twenty-year period, is "a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent." *National Muffler Dealers Association* v. *United States,* 440 U.S. 472, 477 (1979). The IRS' current interpretation, which repudiates its longstanding prior interpretation, is not entitled to judicial deference. *See International Brotherhood of Teamsters* v. *Daniel,* 439 U.S. 551, 566 (1979).

Because the panel's decision sustaining the IRS' new construction flies in the face of the literal terms of the statute and settled principles of statutory construction, this Court should grant certiorari to reverse the judgment below.

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[4] The court below treated the IRS rule at issue here as an interpretative rule, and the cases cited immediately above all concern interpretative rules that were declared invalid as contrary to the controlling statute. As discussed in the next section of this petition, if the IRS rule here at issue is deemed to be a legislative rule rather than an interpretative rule, as we contend it should be, then it is invalid for the additional reason that it was promulgated without compliance with the notice and hearing requirements of the Administrative Procedure Act.

D. The Seventh Circuit's Decision That Revenue Ruling 76-294 Does Not Constitute Legislative Rule-Making Subject To The Administrative Procedure Act Conflicts With This Court's Decision In *Batterton* v. *Francis*, 432 U.S. 416 (1977)

This case presents a second legal issue of broad significance. That issue is whether the IRS' "equipped for use in combinations" rule is a legislative rule, in which case it would be a nullity because it was not promulgated in accordance with the Administrative Procedure Act. The notice and hearing requirements of the Administrative Procedure Act apply to "legislative rules" but not to "interpretative rules." 5 U.S.C. § 553(b); Pet. App. 25a. That Act further provides that "[t]he reviewing court *shall* hold unlawful and set aside any agency action, findings, and conclusions found to be without observance of procedure required by law." 5 U.S.C. § 706(2)(D); Pet. App. 26a-27a. (emphasis supplied).

In *Batterton* v. *Francis*, 432 U.S. 416, 424-426 (1977), this Court clearly articulated a "source of authority" standard for identifying legislative rules, and in that case held that certain regulations had legislative effect because Congress had expressly delegated the legislative function:

> "Congress in § 407(a) expressly *delegated* to the Secretary the power to prescribe standards for determining what constitutes 'unemployment' for purpose of AFDC-UF eligibility. In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect." 432 U.S. at 425.

The regulation there at issue was held subject to the legislative rule-making provisions of the Administrative Procedure Act and the standards of judicial review prescribed by that Act. 432 U.S. at 426, note 10.

The "source of authority" standard has been consistently applied by this Court in recent cases, with varying degrees of

analysis.[5] However, many of the lower courts have adopted a "substantial impact" standard, according to which a rule is a legislative rule if it has a substantial impact on the rights of affected persons.[6] This confusion as to the proper standard for distinguishing a legislative rule from an interpretative rule is discussed in Davis, *Administrative Law Treatise* §§ 7:8 and 7:15 (1979 and 1982 Supp.) ("Courts that keep insisting that impact is the test for distinguishing legislative rules from interpretative rules are departing from Supreme Court law." *Id.*, 1982 Supp. at 176-177). Under either the "source of authority" or the "substantial impact" analysis, the "equipped for use in combinations" rule is a legislative rule which cannot be imposed on taxpayers by informal means which do not satisfy the Administrative Procedure Act.

First, the Court of Appeals' conclusion that the "equipped for use in combinations" rule is merely an "interpretative" rule cannot be reconciled with this Court's "source of authority" analysis in *Batterton* v. *Francis.* Congress expressly delegated rule-making authority to the Secretary of the Treasury to prescribe regulations to determine "taxable gross weight" under the Highway Use Tax in 26 U.S.C. § 4482(b), which provides:

> "Taxable gross weight shall be determined under regulations prescribed by the Secretary (which regulations may include formulas or other methods for determining the taxable gross weight of vehicles by classes, specifications, or otherwise)."

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[5] *See General Electric Co.* v. *Gilbert,* 429 U.S. 125, 140-141 (1976); *Chrysler Corp.* v. *Brown,* 441 U.S. 281, 302-303 (1979); *Rowan Companies, Inc.* v. *United States,* 452 U.S. 247, 252-253 (1981); *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* ____ U.S. ____, , 52 U.S.L.W. 4845, 4847 note 12 (1984).

[6] *See Standard Oil Co.* v. *Department of Energy,* 596 F.2d 1029, 1056-1061 (T.E.C.A. 1978); *Reynolds Metal Co.* v. *Rumsfeld,* 564 F.2d 663, 669-670 (4th Cir. 1977); *Lewis-Mota* v. *Secretary of Labor,* 469 F.2d 478, 481-482 (2d Cir. 1972); *Texaco, Inc.* v. *Federal Power Commission,* 412 F.2d 740, 743-745 (3d Cir. 1969).

This unambiguous delegation of authority is also clear in the Congressional committee reports, which state that "[t]axable gross weight is to be determined in all cases in the manner provided in regulations prescribed by the Secretary or his delegate." H.R. Rep. No. 2022, 84th Cong., 2d Sess. 62 (1956); S. Rep. No. 2054, 84th Cong., 2d Sess. 29 (1956). Congress clearly intended to delegate and expressly did delegate legislative authority to the Treasury Department.

Under the *Batterton* v. *Francis* analysis, the "equipped for use in combinations" rule must be characterized as a legislative rule. Because it was not promulgated in compliance with the Administrative Procedure Act, it is a nullity. *See, e.g., American Standard, Inc.* v. *United States,* 602 F.2d 256, 260 (Ct. Cl. 1979), holding that a legislative regulation relating to consolidated income tax returns was invalid for failure to comply with the notice and hearing requirements of the Administrative Procedure Act.

In addition, the substantial impact on taxpayers of the "equipped for use in combinations" rule confirms that it is a legislative rule. The change from the "customary use" rule to the "equipped for use in combinations" rule had precisely the same effect as a change in tax rates, which certainly would be a legislative act. The fact that Congress felt it necessary to address this issue by legislation in 1983 (see note 3, *supra*) is further evidence that the "equipped for use in combinations" rule is a legislative rule.

The majority of the Court of Appeals panel held the "equipped for use in combinations" rule to be an "interpretative" rule for two reasons. First, the majority noted that the "equipped for use" language was part of the original 1956 regulations, which were promulgated in accordance with the Administrative Procedure Act. (Pet. App. 4a, note 3). This analysis, however, ignores the fact that the "customary use" rule also was expressly set forth in the 1956 regulations — and

in the statute — and for 20 years all parties agreed that the "customary use" rule was the governing test.[7] The panel majority thus allowed the IRS to overturn 20 years of settled interpretation of the statutory "customary use" rule by seizing upon a dormant, shorthand phrase in a table in the regulations. The panel majority did not explain what was "interpreted" by this change of rules. The statute needs no such interpretation, for it contains an unambiguous "customary use" rule, and no new factual circumstance was brought before the IRS which called for a new interpretation of the statute. There simply was a change from one legislative rule to another.

Second, the majority noted that IRS revenue rulings are a classic example of interpretative rule-making. (Pet. App. 4a, note 3). This conclusion assumes that the IRS would not dare to impose a legislative rule by means of an informal revenue

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[7] The IRS position from 1958 until the publication of Revenue Ruling 76-294 in 1976 is identical in all respects to the position of petitioner NI-Gas, and is described by the IRS in G.C.M. 38962, *supra*, as follows:

> "A number of G.C.M.s discuss the proper method of classifying vehicles as single units or as truck-trailer or combinations. The G.C.M.s state that . . . in order to classify a particular vehicle as a taxable truck-trailer combination, there must first be an evidentiary finding that on a nationwide basis, trailers are customarily used with the type of truck in question; . . . G.C.M. 30742 (June 19, 1958) . . . points out that while the words 'customarily used' with reference to semitrailers and trailers appear not [only] in sections 4481(a) and 4482(b), but also in Treas. Reg. §§ 41.4482(a)-1 and 41.4482(b)-1, the words 'equipped for use in combinations' appear only in the use tax schedule. The G.C.M. concludes, therefore, that it must first be determined whether trailers are 'customarily used' with the type of truck in question. Only after that determination is made, is the use tax schedule consulted to determine the taxable gross weight."

G.C.M. 38962, dated February 9, 1983, expressly revoked this long-standing IRS position, an action which the Claims Court correctly described as an "attempt to rewrite history". *Minnesota Power & Light Co., supra*, 6 Cl. Ct. at 567; Pet. App. 49a.

ruling. But the panel majority's uncritical reliance upon the infallibility of the IRS in confining its revenue rulings to interpretative statements is no substitute for analysis of the nature of the rule in question. Rules promulgated by informal means must be scrutinized to determine whether the rules are legislative in nature, and the panel majority failed to undertake that careful scrutiny. *See, e.g., Batterton* v. *Marshall,* 648 F.2d 694 (D.C. Cir. 1980), which invalidated the Department of Labor's attempt to change a formula allocating CETA disbursements, where the change was made by an informal announcement which did not comply with the Administrative Procedure Act.

A decision by this Court concerning the responsibilities of the IRS when engaged in legislative rule-making under express delegations from Congress would greatly clarify the standards in this important area of administrative law. This case presents an appropriate occasion to reaffirm the "source of authority" test which was articulated by this Court in *Batterton* v. *Francis, supra,* but ignored by the court below and not followed uniformly in other Circuits.

CONCLUSION

For the foregoing reasons, NI-Gas respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX TABLE OF CONTENTS

Opinion of the Court of Appeals dated September 10, 1984 ..... 1a

Judgment of the Court of Appeals dated September 10, 1984 ..... 13a

Order of the Court of Appeals dated September 13, 1984, Amending Its Opinion of September 10, 1984 ... 14a

Order of the Court of Appeals dated December 10, 1984, Denying the Petition for a Rehearing En Banc .. 15a

Memorandum of The District Court dated January 13, 1983 ..... 16a

Memorandum Order of The District Court dated April 21, 1983 ..... 22a

Statute and Regulations

Administrative Procedure Act 25a

Highway Use Tax 27a

Letter Dated March 2, 1983, to Sharon L. King, Esq., from Dan Rostenkowski, Chairman of the Committee on Ways and Means, United States House of Representatives 30a

Minnesota Power and Light Co. v. United States, ____ F.Supp. ____, 6 Cl. Ct. 558 (1984) 31a

Photograph of One of NI-Gas' All-Purpose Utility Trucks 63a

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-2143

NORTHERN ILLINOIS GAS COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 3873—Nicholas J. Bua, *Judge.*

ARGUED FEBRUARY 23, 1984—DECIDED SEPTEMBER 10, 1984

Before PELL and FLAUM, *Circuit Judges*, and HENLEY, *Senior Circuit Judge.**

FLAUM, *Circuit Judge.* The appellant Northern Illinois Gas Company brought this action in federal district court seeking a refund of $483.03 paid in highway motor vehicle use taxes. The government denied that the appellant was entitled to a refund and counterclaimed for the outstanding balance of the assessments made against the appellant, $93,205.25, plus interest. The district court ruled in favor of the government. We affirm.

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* The Honorable J. Smith Henley, Senior Circuit Judge for the Eighth Circuit, is sitting by designation.

No. 83-2143

I.

The appellant owns a number of utility trucks that are equipped with pintle hooks[1] suitable for towing heavy trailers. The issue in this case is the validity of a treasury regulation and revenue ruling permitting the Internal Revenue Service (IRS) to tax these trucks as though they were customarily used in combination with heavy trailers, without first determining whether trucks of that type are in fact customarily used with heavy trailers.

Section 4481(a) of the Internal Revenue Code, 26 U.S.C. § 4481(a) (1982), provides:

> A tax is hereby imposed on the use of any highway motor vehicle which (together with the semitrailers and trailers *customarily used in connection with highway motor vehicles of the same type* as such highway motor vehicles) has a taxable gross weight of more than 26,000 pounds . . . (emphasis added).

Taxable gross weight is defined in section 4482(b) as follows:

> (1) the actual unloaded weight of—
> (A) such highway motor vehicle fully equipped for service, and
> (B) the semitrailers or trailers (fully equipped for service) *customarily used in connection with highway motor vehicles of the same type* as such highway motor vehicle, and
> (2) the weight of the maximum load *customarily carried on highway motor vehicles of the same type* as such highway motor vehicle and on the semitrailers and trailers referred to in paragraph (1)(B) (emphasis added).

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[1] A pintle hook is a mechanism that can be attached to the back of a motor vehicle enabling it to pull a trailer or other piece of equipment equipped with an eye within which the hook will fit. Appellee's Brief at 3.

No. 83-2143

Section 4482(b) also gives the Secretary of the Treasury the authority to determine taxable gross weight through regulations, "which regulations may include formulas or other methods for determining the taxable gross weight of vehicles by classes, specifications, or otherwise."

Pursuant to section 4482(b), the Secretary promulgated Treasury Regulation § 41.4482(b)-1(d), which established three main classifications of vehicles for purposes of applying section 4481(a)'s tax: (1) single unit vehicles; (2) tractor-trailer combinations; and (3) truck-trailer combinations. It also provided a schedule of taxable gross weights for vehicles based on these classifications, as well as on the vehicle's actual unloaded weight and the number of axles on the vehicle. Subsection (d)(3), the provision at issue here, specified that trucks that were "equipped for use" in combination with trailers may be classified as truck-trailer combinations and taxed as such under the taxable gross weight schedule. In 1976, the IRS issued Revenue Ruling 76-294, 1976-2 C.B. 364, which stated that utility trucks that were equipped with a pintle hook or other coupling device capable of towing heavy trailers (trailers with two or more axles or one-axled trailers weighing more than 6000 pounds) were "equipped for use" in combination with trailers. Thus, these trucks began to be taxed as truck-trailer combinations under the schedule created pursuant to section 4481(a), regardless of whether the trucks were actually or customarily used with heavy trailers.[2]

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[2] The appellant argues that for many years prior to issuing Revenue Ruling 76-294, the IRS had taken the position that a truck should be taxed as a truck-trailer combination only after a finding that trailers are customarily used with that type of truck. The appellant argues that because the IRS took this position contemporaneous with the enactment of §§ 4481 and 4482, we should give it great weight as evidence of congressional intent. It also argues that Congress's failure to change this administrative construction was ratification of it. However, even assuming that the IRS originally did take the position that the appellant alleges it

(Footnote continued on following page)

The appellant challenges the validity of Treasury Regulation § 41.4482(d)(3) and Revenue Ruling 76-294. It argues that by establishing a rule that utility trucks merely *equipped* to haul heavy trailers are taxable as truck-trailer combinations, the Treasury Department has abrogated the statutory requirement, found in sections 4481 and 4482, that only vehicles *customarily used* with heavy trailers may be taxed as truck-trailer combinations.[3] The appellant's position is that in order to tax a particular vehicle as though it were a truck-trailer combination, the IRS first must find that, on a nationwide basis, heavy trailers are in fact customarily used with that type of

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[2] *continued*
did, this would not mean that it believed this was the only position allowable under the statute. "The Commissioner [of the IRS] is under no duty to assert a particular position as soon as the statute authorizes such an interpretation." *Dickman v. Commissioner*, 104 S. Ct. 1086, 1094 (1984). Thus, we may draw no inferences from the position that the appellants attribute to the IRS, and that position is of no significance here.

[3] The appellant also challenges the validity of Revenue Ruling 76-294 on procedural grounds. Section 553 of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1982), establishes a set of procedural requirements applicable to agency rulemaking that is legislative in nature. The appellant argues that "the Internal Revenue Service's attempt to impose its 'equipped for use in combinations' rule upon NI-Gas constitutes an act of legislative rulemaking which is subject to the Administrative Procedure Act." Appellant's Brief at 30. The flaw in this argument is that it was the Secretary of the Treasury, not the IRS, who promulgated the "equipped for use" standard, and it is undisputed that the Secretary did comply with the APA in so doing. The IRS merely ruled that utility trucks with pintle hooks qualified as "equipped for use" in combination with trailers. This clearly was interpretative rulemaking, not legislative rulemaking, and thus it was exempt from the procedural requirements of § 553 of the APA. *See generally Wing v. Commissioner*, 81 T.C. 17, 26-28 (1983) ("revenue rulings . . . have been held to be the classic example of an interpretative ruling and exempt from the notice and comment provisions of the APA section 553").

vehicle.[4] The government argues in response that it was within the Secretary's discretion under section 4482(b) to classify trucks equipped to haul heavy trailers as trucks "customarily used" with heavy trailers.

II.

As a threshold matter, we note that two circuits already have addressed the precise issue before us in this case, and have reached different results. In *Northern States Power Co. v. United States*, 663 F.2d 55 (8th Cir. 1981), *aff'g* 503 F. Supp. 1182 (D. Minn. 1981), *cert. denied*, 456 U.S. 965 (1982), the Eighth Circuit affirmed a district court ruling that the Secretary properly exercised his authority under section 4482 in allowing trucks equipped with pintle hooks to be taxed as truck-trailer combinations. One month later, the Ninth Circuit, without mentioning the *Northern States Power* decision, took a contrary position. It held that before the IRS may tax a vehicle as a truck-trailer combination, section 4482 required that it make a factual determination that heavy trailers are customarily used with that type of vehicle. *Pacific Gas & Electric Co. v. United States*, 664 F.2d 1133 (9th Cir. 1981). Although both the Eighth and Ninth Circuit positions are reasonable, we agree with the court below that the Eighth Circuit's is the preferred view.

In this case, as in any case involving judicial review of treasury regulations, we must keep in mind the broad discretion that the Secretary of the Treasury has in administering our nation's tax laws. Treasury regulations "must be sustained unless unreasonable and plainly inconsistent

[4] The appellants have not argued that their trucks may be taxed as truck-trailers only if those trucks are actually customarily used with trailers. Such an interpretation of §§ 4481 and 4482 clearly would be precluded by the language of those provisions, since §§ 4481 and 4482 refer not to trailers customarily used with the taxable vehicle, but rather to trailers customarily used with vehicles *of the same type* as the taxable vehicle.

with the revenue statutes." *Commissioner v. Portland Cement Co.*, 450 U.S. 156, 169 (1981) (quoting *Commissioner v. South Texas Lumber Co.*, 333 U.S. 496, 501 (1948)). Deference to the Secretary is particularly appropriate where, as here, the regulation in question was issued pursuant to a specific grant of authority to administer a statutory provision. *United States v. Vogel Fertilizer*, 102 S. Ct. 821, 827 (1982).

We find that the language of sections 4481 and 4482 does not preclude taxation of the appellant's trucks as truck-trailer combinations. The "customarily used" language on which the appellant relies must be read in combination with the language in section 4482(b), which authorizes the Secretary to develop "formulas and other methods" for determining the taxable gross weight of vehicles. Because the "customarily used" requirement is integral to the determination of taxable gross weight, we read section 4482(b) as permitting the Secretary to develop a short-hand method for determining whether a certain type of vehicle is customarily used in combination with heavy trailers. Thus, we reject the appellant's argument that sections 4481 and 4482 require the IRS to tax a particular vehicle as though it were customarily used with a heavy trailer only if it first finds that that type of vehicle is in fact customarily used with heavy trailers.

Having determined that regulation 41.4482(d)(3) is not plainly inconsistent with the language of sections 4481 and 4482, we must determine the reasonableness of the regulation. We find that the Secretary's "equipped for use" standard is a reasonable implementation of the "customarily used" standard contained in the statute. It is not unreasonable to assume that vehicles are equipped for use with heavy trailers for the purpose of using them with heavy trailers. Thus, it was not unreasonable for the Secretary to rule that a vehicle equipped for use with a heavy trailer is, for the purposes of section 4481, a type

of vehicle customarily used with a heavy trailer.[5] It may be, as the appellants contend, that many vehicles that are equipped for use with heavy trailers are not customarily used with heavy trailers. However, in permitting the Secretary to create general classifications to be used in determining taxable gross weight in particular cases, Congress clearly was not insisting on accuracy in every case. Rather, it was acknowledging implicitly that formulas and classifications that may be overbroad or underbroad are often necessary to the efficient administration of a tax collection system. As the Third Circuit has stated in this very context, "[w]hat must be balanced is the advantage of convenience in assessment and collection with admitted inaccuracies in some individual instances." *Atlas Transportation Co. v. United States*, 263 F.2d 573, 576 (3rd Cir.), *cert. denied*, 360 U.S. 918 (1959) (upholding the validity of the use tax schedule established in Treasury Regulation § 41.4482 as it applied to the taxpayer's trucks, even though the schedule assigned a taxable gross weight of 27,000 pounds to a vehicle actually weighing 13,000 pounds). The government has argued that the "equipped for use" standard is easier to administer than the "customarily used" standard, and we have no cause to doubt

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[5] In 1983, Congress amended § 4482, essentially codifying regulation 41.4482(d)(3). The new provision, § 4482(c)(5), went into effect on July 1, 1984. It states:

> CUSTOMARY USE. A semitrailer or trailer shall be treated as customarily used in connection with a highway motor vehicle if such vehicle is equipped to tow such semitrailer or trailer.

Pub. L. No. 97-424, 97th Cong., 2d Sess. § 513(c) (1983). Both parties have asked us to draw inferences favorable to their positions from the passage of this legislation, and they both have supported their positions with reasonable arguments. After considering the matter, we find none of their arguments compelling, and conclude that no inference about the state of the law before the 1983 amendment should be drawn from that amendment. However, we do find the 1983 amendment significant in that it diminishes any doubt about the rationality of treating vehicles that are equipped for use with trailers as vehicles that are customarily used with trailers.

this. Thus, we hold that regulation 41.4482(d)(3) was a reasonable exercise of the Secretary's discretion. Furthermore, in light of this holding, and because we have no reason to question the reasonableness of the IRS's view that utility trucks with pintle hooks are "equipped for use" in combination with trailers, we find that Revenue Ruling 76-294 also was valid.[6] Accordingly, we affirm the decision of the district court.

PELL, *Circuit Judge*, dissenting. With due respect, I must dissent from the majority's approval of Treasury Regulation § 41.4482(d)(3), which disregards the customary-use test set forth in the statute and instead imposes a less equitable equipped-for-use test to determine which taxpayers are saddled with liability for the highway use tax. In my opinion the Ninth Circuit correctly resolved the issue in *Pacific Gas and Electric Co. v. United States*, 664 F.2d 1133 (9th Cir. 1981).

The majority correctly states that the regulation must be sustained unless unreasonable and inconsistent with the statute. *Commissioner v. Portland Cement Co.*, 450 U.S. 156, 169 (1981). Although this standard grants the Secretary discretion in promulgating regulations with which to administer the tax laws, that discretion is limited.

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.

[6] The appellant also has argued that "the Internal Revenue Service has improperly discriminated against plaintiff-appellant in its position toward utility trucks." Appellant's Brief at 23. As we understand the argument, the appellant is claiming that Revenue Ruling 76-294 is invalid because it treats utility trucks differently from other types of trucks. We have considered this argument and find it to be without merit.

> A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

Manhattan General Equipment Co. v. Commissioner, 297 U.S. 124 (1936); *see also Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980) (EEOC may not adopt regulations inconsistent with statute.).

Because I agree with the Ninth Circuit that the IRS's interpretation of 41.4482(d)(3) is not in harmony with the statute, I cannot subscribe to the majority's conclusion that the equipped-for-use test is a reasonable shorthand test for determining whether a type of truck is *customarily* used in combination with a heavy trailer.

The principal redeeming factor, as I see it, in favor of arbitrarily adopting this stringent, but unrealistic, equipped-for-use test is that it will produce more money for the public fisc. While this may be cheery news to taxpayers not affected, it also reflects a motivational factor not entirely alien to those charged with the duty of collecting taxes.

Here, however, there is more involved than merely increasing the total of general revenue and that is the objective of keeping in repair our constantly deteriorating highways. For the purposes of meeting that problem, Congress imposed a tax on the use of highways. Logically the intent of Congress was that the highway use tax bear most heavily on those whose use of the highway caused the most wear and tear. Imposing the tax on those types of trucks that are customarily used with heavy trailers is a reasonable method of determining which types of trucks should bear the burden of the tax. The customary-use test is not a fine-tuned means of apportioning the burden of the use tax, but it is related to the actual use of the highways by a type of truck. The equipped-for-use test, in contrast, is inconsistent with Congress's attempt to apportion the tax equitably. The equipped-for-use test is not reflective of the actual use of heavy trailers. A pintle hook, by itself, causes no additional wear on a high-

way. As the evidence appellant attempted to introduce demonstrates, utility trucks equipped with pintle hooks more often than not are *not* used in combination with heavy trailers.

The majority correctly points out that ease in administration is an important aspect of the tax laws. However, here Congress took that factor into account by developing a standard that only requires a simple determination of whether a type of truck is customarily used in combination with heavy trailers. This showing is not unduly burdensome and is a reasonable means of determining who should pay the tax. I do not think that this point was addressed adequately in *Northern States Power Co.* in which the utility argued that the IRS must show that each truck was customarily used with a trailer. The court properly rejected this argument, but then jumped to the conclusion that the equipped-for-use test was a proper means of determining the customary usage of a type of truck. *Northern States Power Co.* then is of minimal value in evaluating appellant's claim.

Because I view the IRS's current application of the equipped-for-use test as plainly inconsistent with the statute's mandated customary-use test I do not evaluate the parties' other claims. I do note, however, that the fact that appellant's reading of the statute was long accepted by the IRS is entitled to some weight in judging the reasonableness of its current application. This previous acceptance by the IRS is brushed aside in a marginal note in the majority opinion by what amounts in effect to the rather startling proposition that the Secretary is entitled to change his mind, or putting it otherwise, that the law is what the Secretary currently calls it. The fact is here that there was evidence showing, whatever the duty to do so might have been, there was a "particular position" taken.

A system of tax collection which deprives the commercial and industrial world of the opportunity of basing budgetary and other fiscal planning matters on a firm and

consistent standard, rather than on one comparable to shifting sand, it seems to me, is one which should be soundly condemned as not being in the best interest of the national economy.

Also, I find it disturbing that this case manifests another example of the apparent disinclination of the tax collecting authorities to put a hand on the oar in the interest of promoting national uniformity and coherence in the application of federal tax laws. *See* Ginsburg, *Making Tax Law Through the Judicial Process*, 70 A.B.A.J. 74, 77 (March 1984) ("The tax law has become an extraordinarily intricate game played to arcane, often conflicting rules that often lack moorings in any discernible policy.").

The Government, of course, had no basis for endeavoring to have the Supreme Court review the *Northern States Power* decision. But a month later a square conflict among the circuits was created by *Pacific Gas*. The Government thereupon apparently was willing to forego this silver tray opportunity to seek finality on the troublesome issues presented, and, thereby to seek consistent national construction of the statute. Instead the approach of the Eighth Circuit was adopted although presumably not so in the Ninth Circuit. The Eighth Circuit was a one page opinion affirming a summary judgment in a summary fashion. The Ninth Circuit opinion was by contrast an analytical opinion.

Finally, I am not unmindful that the continued application of the regulation may no longer be a source of other inconsistent opinions as to tax consequences visited on vehicles of the involved types after July 1, 1984. The substantial sum of tax dollars at stake, however, involving such vehicles prior to that date causes a proper resolution of the issue to be of continued vitality and importance. The majority opinion finds in the passage of the 1983 amendment some significance to the effect that Congress was recognizing the rationality of the regulation.

I fail to find any rationality in the adoption of this simplistic approach, although it is bound to increase

revenues for highways, an aspect recognizable certainly by the Congress. Clearly the action bears no rational relationship to the issue of whether vehicles merely accepted for use per se contribute to the wear and tear of the highways in the manner that vehicles "customarily used" in combination with heavy trailers do. It strikes me that a reasonably strong inference is presented that Congress was doing nothing more than opting for the money producing aspects of the simplistic test although that test was irrationally related to its own express purpose of imposing the test on vehicles "customarily used." I express no opinion, leaving for further litigation, often indecisive as we know from prior appeals on the general issue, the question of whether removable coupling devices used only occasionally will bring the equipment within the ambit of the 1983 amendment.

For the foregoing reasons, I would reverse and remand for a factual determination of the customary use of this type of utility truck. Accordingly, I dissent.

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Opinion by Judge Flaum
Judge Pell dissenting
JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 10, 1984.

Before

Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. J. SMITH HENLEY, *Senior Circuit Judge**

NORTHERN ILLINOIS GAS COMPANY, *Plaintiff-Appellant,*	Appeal From The United States District Court for the Northern District of Illinois, Eastern Division
No. 83-2143 *vs.*	No. 80 C 3873 Nicholas J. Bua, Judge.
UNITED STATES OF AMERICA, *Defendant-Appellee.*	

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

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* Honorable J. Smith Henley, Senior Circuit Judge for the Eighth Circuit, is sitting by designation.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 13, 1984

Before

Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Senior Circuit Judge*
Hon. J. SMITH HENLEY, *Senior Circuit Judge**

NORTHERN ILLINOIS GAS COMPANY,
Plaintiff-Appellant,

No. 83-2143 *vs.*

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal From The United States District Court for the Northern District of Illinois, Eastern Division
No. 80 C 3873
Nicholas J. Bua, Judge.

ORDER

IT IS ORDERED that the following revisions be made in the September 10, 1984 opinion in the above cause:

Page 11, fourth line from the bottom, should read "1983 amendment:

Page 12, line sixteen, should read "1983 amendment."

* Honorable J. Smith Henley, Senior Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

December 10, 1984

Before

Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Senior Circuit Judge*
Hon. J. SMITH HENLEY, *Senior Circuit Judge**

NORTHERN ILLINOIS GAS COMPANY,
Plaintiff-Appellant,

No. 83-2143 *vs.*

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal From The United States District Court for the Northern District of Illinois, Eastern Division
No. 80 C 3873
Nicholas J. Bua, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Plaintiff-Appellant, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Honorable J. Smith Henley, Senior Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

NORTHERN ILLINOIS GAS COMPANY, *Plaintiff,* v. UNITED STATES OF AMERICA, *Defendant.*	No. 80 C 3873 Honorable Nicholas J. Bua, Presiding

MEMORANDUM

The instant matter was brought by plaintiff, Northern Illinois Gas Company (Ni-Gas), for a refund in the amount of $483 in taxes paid. Defendant has countersued for $93,205.25 plus interest which it claims is still owing for tax assessments made against plaintiff on August 30, 1977.

This Court has jurisdiction over the instant matter pursuant to 28 U.S.C. § 1346(a)(1) and (c).

The issue in this case revolves around the validity of certain Treasury Regulations and Revenue Rulings which resulted in the plaintiff being taxed, pursuant to 26 U.S.C. § 4481(a), at a higher rate than it contends is appropriate. Under Revenue Ruling 76-294, trucks which are "equipped for use in combinations" with twin-axle trailers or with single-axle trailers which weigh in excess of 6,000 pounds are taxed at a higher rate than trucks which tow single-axle trailers weighing less than 6,000 pounds. Plaintiff contends that such a ruling is invalid insofar as it ignores the "customary use" standard set out in 26 U.S.C. §§ 4481 and 4482(b)(1) which, it is argued, require the taxing body to consider not whether the trucks are merely equipped for the heavier duty use, but whether such vehicles are actually used in such a manner.

FINDINGS OF FACT[1]

1. Plaintiff is a utility company incorporated in Illinois and has its principal place of business in Aurora, Illinois.

2. During the years July 1, 1971 to June 30, 1972, July 1, 1972 to June 30, 1973, and July 1, 1973 to June 30, 1974, plaintiff used certain highway motor vehicles, namely, two-axled utility trucks having an unloaded weight of 10,100 pounds, for transporting personnel, tools, and equipment in connection with its maintenance or installation of public utility property.

3. These trucks were equipped with a coupling device, known as a "pintle hook," for pulling a trailer with two or more axles or a one-axled trailer with a gross vehicle weight of 6,000 pounds or more.[2]

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[1] To the extent that any of the findings of fact included herein are deemed to be conclusions of law, they are hereby adopted as conclusions of law. To the extent that any of the conclusions of law included herein are deemed to be findings of fact, they are hereby adopted as findings of fact.

[2] The plaintiff owns 178 trailers, all of which have double axles and are considered "heavy" trailers taxable as used in combinations under the statute. All such trailers weigh in excess of 6,000 pounds. However, this weight is immaterial as all trailers with more than one axle are deemed taxable as heavy trailers under Revenue Ruling 76-294. Plaintiff does not challenge the Ruling insofar as the tax under 26 U.S.C. § 4481 is imposed on vehicles customarily used in combination with single-axle trailers weighing in excess of 6,000 pounds or with trailers with two or more axles.

Otherwise irrelevant evidence received in the instant case reveals that plaintiff makes frequent (if not customary) use of the "heavy" trailers taxable under the Regulations and the Revenue Ruling in connection with the taxed vehicles. The number of trucks used with heavy trailers and the percentage of time each truck was put to such use is set out as follows:

Type of Truck	Total Number	0%	1-10%	10-25%	25-50%	50-75%	75%-100%
Street Truck	192	26	16	7	13	13	117
Dump Truck	55	19	29	1	4	0	2

4. Plaintiff filed Federal Highway Use Tax Returns (Form 2290) for the years in question. An audit of these returns resulted in assessments in the sum of $93,684.28 being made against plaintiff on August 30, 1977 due to a determination that the trucks in question were "equipped for use in combinations" and thus were taxable under 26 U.S.C. § 4481(a).

5. Notice of the assessments and demand for payment thereof were duly given to plaintiff.

6. In September, 1977, plaintiff paid a portion of the amount ($483.03), then filed a Claim for Refund (Form 843).

7. After being advised that its claim would be disallowed, plaintiff filed a Waiver of Notice of Claim Disallowance (Form 2297) and subsequently instituted this action.

8. Defendant denies that plaintiff is entitled to a refund and has counterclaimed for the balance of the amount assessed against it ($93,204.25), plus interest thereon.

CONCLUSIONS OF LAW

The issue central to the case at bar is whether the Secretary of the Treasury has the power to issue a Regulation which imposes the 26 U.S.C. § 4481 tax upon vehicles which are merely equipped to tow so-called heavy trailers in lieu of a specific factual finding concerning the actual use of such vehicles. Correspondingly, the Revenue Rulings under which such tax has been imposed following the "equipped for use" standard are also here challenged. *See,* e.g., Revenue Ruling 76-294, 1976-2 Cum. Bull. 364.

The issue here at bar has been squarely dealt with in two instances with conflicting results. In *Pacific Gas and Electric Co. v. United States,* 664 F.2d 1133 (9th Cir. 1981), the Court held that the statute and the regulations make it clear that trailers are only to be included in the gross taxable weight of

such a truck if the trailer is actually customarily used with the vehicle. Consistent therewith, the Court required that a finding of fact be made as to the actual use of the vehicle.

By contrast, the Eighth Circuit has held that no factual determination is required. In *Northern States Power Co. v. United States,* 663 F.2d 55 (8th Cir. 1981), the Court of Appeals adopted the opinion of the district court which had held that promulgation of the "equipped for use" standard in the Treasury Regulations and in the Revenue Rulings was within the discretion specifically given to the Secretary of the Treasury in the statute. Accordingly, under this standard, no factual determination need be made. *Northern States Power, supra, aff'g.* 503 F.Supp. 1182 (D. Minn. 1981).

The Court concedes that determination of which is the better rule is a difficult task. Although both rules are certainly logical and rational, this Court is of the opinion that, in light of the discretion given to the Secretary of the Treasury and in view of necessary administrative ease, the rule adopted by the Eighth Circuit is preferable and is hereby adopted by this Court.

The statutory scheme in question delegates to the Secretary of the Treasury the power to determine, through regulations, the taxable gross weight of a vehicle through the use of "formulas or other methods." Such methods may be used to determine the taxable weights by classes, specifications, or otherwise. 26 U.S.C. 4482(b). Pursuant to this authorization, Treasury Regulation 41.4482(b)-1(d)3 was promulgated under which vehicles "equipped for use in combinations" are taxable under 26 U.S.C. § 4481. Revenue Ruling 76-294 is in accord with this Regulation.

The Treasury Regulation and the Revenue Ruling are not in conflict with the statute. As the District Court noted in *Northern States Power:*

> The "customary use" (language used) in the statute defines the type of trailer which may be included in the

> weight computation for the vehicle. The statute does not specify that the trailer actually be customarily used with the taxable vehicle, but only that the trailers be of the kind customarily used with that *type* of vehicle. No evidentiary showing that a particular taxpayer's vehicles are so used is required. Section 4482 allows the Secretary to prescribe regulations to determine the gross weight of a vehicle. That determination obviously includes a decision whether to classify a vehicle as the type customarily used in combination with trailers.

503 F.Supp. at 1183-84. The classification that the trailers were used with the type of vehicle owned by Ni-Gas was properly made in the case at bar. No other factual determination was required.

The opinion of the Ninth Circuit in *Pacific Gas and Electric Co. v. United States,* 664 F.2d 1133 (9th Cir. 1981) held that the classification of a vehicle as a "truck trailer" combination merely because the vehicle is "equipped for use in combination" with trailers was inconsistent with the language of the statute and the intent of Congress. However, viewed in light of the language of the statute as noted in the opinion of the District Court in *Northern States Power,* this Court does not concur in that conclusion. As noted, the "customary use" language is only for limited application. More important is the determination that the vehicle is of the general *type* used in combination. Once that determination has been made, as it was in the case at bar, actual or customary use is immaterial.

The Ninth Circuit's opinion is further flawed in that it ignores the broad discretion clearly given to the Secretary of the Treasury in the statute. Of necessity, the entity charged with the administration of a statutory scheme such as that before the Court must be given broad discretion so that the scheme may be properly effectuated. To require, as plaintiff seeks, that a factual determination be made as to the actual use of each vehicle of each potential taxpayer would prove a costly and onerous burden and would undermine the very rationale for the

statutory delegation of authority to the Secretary of the Treasury. The rule of the Ninth Circuit clearly invades this statutory province.

In light of the foregoing, the Court cannot concur that the agency's interpretation supersedes the language chosen by Congress in the passage of the statute. *See, Mohasco Corp. v. Silver,* 447 U.S. 807 (1980). Such interpretation, in the opinion of this Court, merely carries into effect the will of Congress as expressed by the statute.

Conclusion

Under 26 U.S.C. § 4481 and the Treasury Regulations promulgated thereunder, the defendant has properly assessed the plaintiff's tax liability for the years in question. Judgment is therefore entered in favor of defendant on the counterclaim in the amount of $93,204.25. Because the issues in this case are not entirely without merit, the request for interest and costs is denied. The Complaint of the plaintiff is hereby dismissed with prejudice.

IT IS SO ORDERED.

/s/ NICHOLAS J. BUA,
Nicholas J. Bua
Judge, United States
District Court

Dated: January 13, 1983

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

NORTHERN ILLINOIS GAS COMPANY, *Plaintiff,* v. UNITED STATES OF AMERICA, *Defendant.*	No. 80 C 3873 Honorable Nicholas J. Bua, Presiding

MEMORANDUM ORDER

Before the Court is the plaintiff's Motion For Reconsideration and Amendment of this Court's January 13, 1983 judgment. Also before the Court is the defendant's Motion to Alter or Amend the judgment. For the reasons stated herein, plaintiff's Motion to Reconsider is denied and the January 13, 1983 judgment is amended as stated in this Order.

A. Plaintiff, in support of its Motion to Reconsider argues that the recently enacted Highway Revenue Act of 1982 (the Act), effective July 1, 1984, inherently rejects the position taken by this Court in its January 13, 1983 judgment. It contends that the specific clauses adopting the position of the Court were included to represent a *change* in prior law.[1] The Court does not concur in this reading of the statute.

As noted by defendant, in explaining the provisions of the Act, Congress stated that it modifies current law by (1) raising

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[1] Specifically, the new statute reads:

"(5) CUSTOMARY USE. A semi-trailer or trailer shall be treated as customarily used in connection with a highway motor vehicle if such vehicle is equipped to tow such semi-trailer or trailer."

26 U.S.C. § 4482(c)(5).

the highest taxable gross weight of a vehicle not subject to tax from 26,000 pounds to 33,000 pounds, (2) changing the rate of tax from a flat amount per 1,000 pounds to a graduated amount, (3) exempting from the tax a vehicle that is used on the public highways less than 2,500 miles during a taxable period and (4) terminating the tax as of October 1, 1988. H. Rep. No. 97-945, 97th Cong., 2d Sess. at pp. 17-18. Congress made no statement to the effect that the provision classifying vehicles according to the manner in which they are equipped represents a change in the law. What Congress did say is that "the bill *makes it clear*" that the vehicles shall be classified in such a manner. *Id.* The meaning of "customary use" is specifically not among the modifications enacted; instead, it is the opinion of the Court that by specifically including the section of the Act relating to customary use, Congress merely sought to clarify what was an ambiguity which had formed the basis of this and other litigation.

Plaintiff, in support of its argument, cites the Internal Revenue Service General Counsel's Memorandum (GCM) issued February 16, 1983 which summarizes the position of the General Counsel contained in prior GCMs as requiring that a factual determination must be made before a determination of customary use can be issued. Plaintiff's reliance on the GCM is misplaced in two regards. First, a GCM is merely an internal memorandum not accorded the force of law. Additionally, there is nothing in the legislative record which indicates that Congress was even aware of the GCMs which adopt plaintiff's position. Further, the February 16, 1983 GCM states that,

> Even though section 513(c) of the 1982 Act (the Customary Use section) was not made retroactive, the use of the word "clarification" in the provision, and the Committee Report language, suggest that the equipped-for-use test the section prescribes is a correct interpretation of *present law.* Thus, our prior interpretation of present law, as set forth in the GCMs was in error.

I.R.S. Positions Report (CCH) ¶ 1164 (Feb. 16, 1983).

From the above, it is clear that the General Counsel's position is that present law, which is the same as that affecting the case at bar, imposes the equipped-for-use standard as adopted by this Court in its January 13, 1983 order and by the Eighth Circuit in *Northern States Power Co. v. United States,* 663 F.2d 55 (8th Cir. 1981). As the equipped-for-use standard is the appropriate test under both existing law and the Act as effective July 1, 1984, plaintiff's Motion for Reconsideration and Amendment must be denied.

B. Defendant has moved this Court to amend its January 13, 1983 judgment to include interest on the unpaid taxes owed. The Court hereby orders that the judgment be so amended.

Under 26 U.S.C. § 6601(a), interest on unpaid taxes shall be paid at a rate of interest established under 26 U.S.C. § 6621. Additionally, 28 U.S.C. § 1961(a) and (c)(1) specifically provides that interest at the rate established under 26 U.S.C. § 6621 "shall" be allowed on any money judgment for federal taxes rendered in a civil case in a district court. Pursuant to these statutes, prejudgment and post-judgment interest is clearly owing in the case at bar.

Conclusion

For the reasons stated herein, plaintiff's Motion for Reconsideration and for Amendment of judgment is denied. Defendant's Motion to Alter or Amend the judgment is granted to provide defendants with an award of interest as provided by law.

IT IS SO ORDERED.

/s/ NICHOLAS J. BUA
Nicholas J. Bua
Judge, United States
District Court

Dated: April 21, 1983

STATUTE AND REGULATIONS

Administrative Procedure Act

5 U.S.C. § 553:

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and

public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 702:

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof . . .

5 U.S.C. § 706:

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law,

interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

. . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law . . .

Highway Use Tax

26 U.S.C. § 4481(a):

§ 4481. Imposition of Tax

(a) IMPOSITION OF TAX.—A tax is hereby imposed on the use of any highway motor vehicle which (together with the semitrailers and trailers customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle) has a taxable gross weight of more than 25,000 pounds, at the rate of $3.00 a year for each 1,000 pounds of taxable gross weight or fraction thereof.

26 U.S.C. § 4482:

§ 4482. Definitions

(a) HIGHWAY MOTOR VEHICLE.—For purposes of this subchapter, the term "highway motor vehicle" means any motor vehicle which is a highway vehicle.

(b) TAXABLE GROSS WEIGHT.—For purposes of this subchapter, the term "taxable gross weight", when used with respect to any highway motor vehicle, means the sum of—

(1) the actual unloaded weight of—

(A) such highway motor vehicle fully equipped for service, and

(B) the semitrailers and trailers (fully equipped for service) customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle, and

(2) the weight of the maximum load customarily carried on highway motor vehicles of the same type as such highway motor vehicle and on the semitrailers and trailers referred to in paragraph (1)(B).

Taxable gross weight shall be determined under regulations prescribed by the Secretary (which regulations may include formulas or other methods for determining the taxable gross weight of vehicles by classes, specifications, or otherwise).

26 C.F.R. § 41.4482(a)-1(b):

§ 41.4482(a)-1. **Definition of highway motor vehicle.—**

. . .

(b) *Treatment of certain excluded vehicles.* Although trailers and semitrailers used in combination with highway trucks or truck-tractors are not vehicles the use of which is subject to the tax imposed by section 4481(a), trailers and semitrailers customarily used in combination with highway trucks or truck-tractors are taken into account in determining the taxable gross weight of the highway motor vehicle under § 41.4482(b)-1, which is the base of the tax.

26 C.F.R. § 41.4482(b)-1(a):

§ 41.4482(b)-1. **Definition of taxable gross weight**—(a) *In general.* The tax imposed on the use of a highway motor vehicle (of a taxable gross weight in excess of 26,000 pounds) is based on the taxable gross weight of such highway motor vehicle. Taxable gross weight of a highway motor vehicle is

determined with reference to the sum of (1) the actual unloaded weight of such highway motor vehicle (fully equipped for service); (2) the actual unloaded weight of any one or more trailers or semitrailers (fully equipped for service) customarily used in combination with highway motor vehicles of the same type as such highway motor vehicle; and (3) the weight of the maximum load customarily carried on highway motor vehicles of the same type as such highway motor vehicle and on any one or more trailers or semitrailers customarily used in combination with highway motor vehicles of the same type as such highway motor vehicle.

26 C.F.R. § 41.4482(b)-1(d):

(d) *Schedule of taxable gross weights for periods after June 30, 1969.* The following schedule of taxable gross weights, based on the sum of the weights referred to in paragraph (a) of this section, is hereby prescribed for taxable periods beginning on or after July 1, 1969. Any highway motor vehicle which falls in one of the categories shown in the following schedule shall be considered, for purposes of the regulations in this part, to have the taxable gross weight assigned to such category. Any highway motor vehicle which does not fall in one of the categories shown in the following schedule shall be considered, for purposes of the regulations in this part, to have a taxable gross weight of 26,000 pounds or less.

USE TAX SCHEDULE

	Taxable gross weight (in pounds)
1. Single units:	
(a) 2 axled truck equipped for use as a single unit with actual unloaded weight of 13,000 pounds or more	27,000
. . .	
3. Truck-trailer combinations:	
(p) 2 axled truck with actual unloaded weight of 9,000 pounds or more and less than 12,000 pounds and equipped for use in combinations	40,000

COMMITTEE ON WAYS AND MEANS

U.S. HOUSE OF REPRESENTATIVES

WASHINGTON, D.C. 20515

March 2, 1983

Sharon L. King, Esq.
Isham, Lincoln & Beale
Three First National Plaza
Chicago, Illinois 60602

Dear Ms. King:

Thank you for your letter concerning the definition of taxable vehicles in H.R. 6211, the Surface Transportation Assistance Act of 1982. I apologize for the delay in responding to your letter, and I regret that it did not come to the attention of the Committee's staff until after the Act had passed.

Since that time, the Committee's staff has discussed this matter with the I.R.S. and has emphasized that it was not the Committee's intention to influence the outcome of ongoing litigation. It was our intention to clarify the "customary use" definition in order to avoid litigation on this issue in the future by basing the tax on an objective, factual standard. We agree with the Service that it is not feasible to require a case-by-case determination of actual use in imposing this tax.

I appreciate your contacting me on this matter.

Sincerely yours,

/s/ DAN ROSTENKOWSKI

Dan Rostenkowski
Chairman

DR:ppm

IN THE UNITED STATES CLAIMS COURT

Filed
November 21, 1984
U.S. Claims Court

No. 617-81T

MINNESOTA POWER AND LIGHT COMPANY

v.

THE UNITED STATES

Tax; excise; IRC § 4481 and § 4482; highway use tax; utility vehicles taxed on combination weight; pintle hook coupling devices; Revenue Ruling 76-294 invalid as not authorized by statute; customary use test vs. equipped for use test; irrebuttable presumption.

James W. Littlefield, Minneapolis, Minnesota, for plaintiff.

Betty N. Ferber, Washington, D.C., with whom was *Assistant Attorney General Glenn L. Archer, Jr.,* for defendant.

OPINION

YOCK *Judge.*

The plaintiff in this case seeks a refund of federal excise taxes and interest in the amount of $24,599.15, paid in highway use tax assessments for the tax years ended June 30, 1973, June 30, 1974, June 30, 1975, and June 30, 1976, plus statutory interest. The assessments were based upon a determination by the Internal Revenue Service (IRS) that the plaintiff's utility trucks, equipped with pintle hooks capable of towing heavy-duty trailers, should be taxed as truck-trailer combinations rather than as single unit vehicles. The plaintiff paid the assessed taxes and, after the IRS disallowed its claim for refund, filed suit in the United States Court of Claims. On October 1, 1982, the case was transferred to this Court. The defendant has now filed a motion for summary judgment. For the reasons discussed in this opinion, the defendant's motion for summary judgment is denied.

Facts

The plaintiff, Minnesota Power and Light Company, is a public utility company engaged in generating, transmitting and distributing electricity and natural gas in northeastern Minnesota. During the tax years in issue, the plaintiff owned and operated approximately 295 utility trucks which were used in connection with constructing, maintaining and repairing the plaintiff's utility system. Almost all of these trucks were equipped with coupling devices, known as pintle hooks,[1] capable of towing either trailers with two or more axles or trailers with one axle but having gross vehicle weights of 6,000 pounds

[1] A pintle hook is a mechanism that can be attached to the back of a truck or other motor vehicle which will enable that vehicle to pull a trailer or other piece of equipment if the other piece of equipment is equipped with an eye that will go into the hook.

or more (both of these types of trailers are hereinafter referred to as heavy-duty trailers). While the plaintiff owned approximately 64 trailers during the years in issue, only about 40 trailers can be classified as heavy-duty trailers.

On its federal highway use tax returns, filed for the tax years ended June 30, 1973, through June 30, 1976, the plaintiff classified its utility trucks as single unit vehicles and paid the use taxes applicable to that class of highway motor vehicles. During a subsequent audit, the IRS determined, without considering whether trucks of the type in question are customarily used in combination with such trailers, that the presence of pintle hooks on the plaintiff's trucks caused those vehicles to be "equipped for use in combinations" with trailers. Accordingly, the IRS reclassified those trucks as "truck-trailer combinations," a classification subject to a higher tax rate than the rate applicable to "single unit" vehicles.

On the basis of its reclassification of the plaintiff's utility trucks as truck-trailer combinations, the IRS assessed additional highway use taxes against the plaintiff. The plaintiff paid the assessments and timely filed claims for refunds in the amount of $24,599.15.[2] The primary basis for such refund claims was that the plaintiff's utility vehicles were not "customarily" used as truck-trailer combinations. In effect, the plaintiff's position was and is that the IRS can utilize an "equipped for use" test, under its authority contained in section 4482(b) and set out in Treas. Reg. § 41.4482(b)-1(d), for purposes of administrative convenience in collecting the subject excise taxes. However, the plaintiff argues that the IRS cannot disregard the statutorily mandated "customary use" test, when faced with a taxpayer

[2] The particular refund claims were as follows:

Period	Tax	Interest
7-1-72 to 6-30-73	$5,046.00	$1,681.52
7-1-73 to 6-30-74	5,190.00	1,418.10
7-1-74 to 6-30-75	4,761.00	1,015.23
7-1-75 to 6-30-76	4,566.00	921.30

who asserts that his vehicles are not customarily used in a manner consistent with the type of equipment (*e.g.*, a pintle hook) with which his vehicles are equipped. As a result, the plaintiff's argument before this Court seeks the judicial recognition of a two-prong test. First, all vehicles which are "equipped for use in combinations" may be administratively classified as single units, truck-trailer combinations, or tractor-trailer combinations, depending upon the appropriate formula devised by the IRS pursuant to section 4482(b). However, the second prong of the test requires, upon such classification by the IRS and subsequent challenge by the taxpayer, that the taxpayer be given an opportunity to prove that the subject vehicles are not customarily used in the manner in which they have been classified by the IRS, pursuant to section 4481(a).

On October 22, 1979, and on October 29, 1979, the Internal Revenue Service Center, in Ogden, Utah, mailed to the plaintiff formal notices of disallowance of the plaintiff's claims for refund. In this action, the IRS has asserted that its denial of the plaintiff's refund claims was based upon its belief that the "equipped for use" test, formulated by the IRS under section 4482(b), was the only test which need be applied in classifying a taxpayer's vehicles for purposes of the federal highway use tax. In effect, the IRS alleges that the broad delegation of authority to devise a formula, contained in section 4482(b), allows it to define "customary use" in whatever manner it sees fit. Thus, the IRS argues that it has defined the "customary use" statutory language as being essentially synonymous with the "equipped for use" language. In adopting this position, however, the IRS is forced to distinguish almost twenty years of virtually unchanged treasury regulations, revenue rulings, and General Counsel Memoranda, all of which contained references to a determination of "customary use." As will be seen, this Court refuses to equate the "customary use" test with the IRS's "equipped for use" test and, as a result, adopts the above two-prong test advocated by the plaintiff.

Thereafter, on October 21, 1981, the plaintiff filed this action for refund. The defendant has now filed a motion for summary judgment. The plaintiff has filed a brief in opposition to the defendant's motion for summary judgment, and the defendant has replied. Oral argument on defendant's motion, along with oral argument on two companion cases — *Kansas City Power & Light Co.* v. *United States,* No. 230-82T, and *L.E. Myers Co.* v. *United States,* No. 362-79T — was held in Washington, D.C., on October 2, 1984.[3]

Discussion

In 1956, Congress enacted the Highway Revenue Act of 1956, seeking to raise, for the first time, additional revenue from the use of certain highway motor vehicles in order to finance federal aid for the construction of this nation's interstate highways. Pub. L. No. 84-627, 84th Cong., 2d Sess (1956). Despite subsequent statutory modifications, the highway use tax has always been computed based upon the weight of the motor vehicle in question, plus the unloaded weight of any trailer customarily used with vehicles of the type in question and the weight of the load customarily carried on that type of vehicle and on any trailer customarily used with the vehicle.

Section 4481 imposes a tax "on the use of any highway motor vehicle which (together with the semitrailers and trailers *customarily* used in connection with highway motor vehicles of the same type as such highway motor vehicle) has a taxable gross weight of more than 26,000 pounds * * *." 26 U.S.C. § 4481(a) (1982) (emphasis supplied).[4]

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[3] There are currently suspended in this Court five other cases (in addition to the two companion cases cited above) awaiting decisions in this matter. In addition, there appears to be considerable interest from within the utility industry as a whole in the outcome of this decision.

[4] In all pertinent respects, the Internal Revenue Code and treasury regulations sections cited in this opinion remained essentially unchanged between 1956 and 1983. Therefore, to facilitate reference, the 1983 version of the regulations will be cited throughout this opinion.

> The term "taxable gross weight" is defined as the sum of:
>
> (1) the actual unloaded weight of—
>
> (A) such highway motor vehicle fully equipped for service, and
>
> (B) the semitrailers and trailers (fully equipped for service) *customarily* used in connection with highway motor vehicles of the same type as such highway motor vehicle, and
>
> (2) the weight of the maximum load customarily carried on highway motor vehicles of the same type as such highway motor vehicle and on the semitrailers and trailers referred to in paragraph (1)(B).

26 U.S.C. § 4482(b) (emphasis supplied).

In addition, section 4482(b) provides that "(t)axable gross weight shall be determined under regulations prescribed by the Secretary [of Treasury] (which regulations may include *formulas or other methods* for determining the taxable gross weight of vehicles by classes, specifications, or otherwise)." (Emphasis added.) Pursuant to this section, the Secretary of the Treasury (Secretary) promulgated regulations, in late 1956, defining the terms "highway motor vehicle" and "taxable gross weight" and setting forth a schedule of taxable gross weights for trucks having certain coupling characteristics. In this regard, Treas. Reg. § 41.4482(a)-1(b) provides that:

> Although trailers and semitrailers used in combination with highway trucks or truck-tractors are not vehicles the use of which is subject to the tax imposed by section 4481(a), trailers and semitrailers *customarily* used in combination with highway trucks or truck-tractors are taken into account in determining the taxable gross weight of the highway motor vehicle under § 41.4482(b)-1, which is the base of the tax. (Emphasis supplied.)

26 C.F.R. § 41.4482(a)-1(b). Further, Treas. Reg. § 41.4482 (b)-1(a) sets out a method for determining a vehicle's "taxable gross" weight, which provides that:

> Taxable gross weight of a highway motor vehicle is determined with reference to the sum of (1) the actual unloaded weight of such highway motor vehicle (fully equipped for service); (2) the actual unloaded weight of any one or more trailers or semitrailers (fully equipped for service) *customarily* used in combination with highway motor vehicles of the same type as such highway motor vehicle * * *. (Emphasis supplied.)

26 C.F.R. § 41.4482(b)-1(a). In addition, this regulation sets out a schedule of taxable gross weights for three specific categories of highway motor vehicles: (1) single units; (2) tractor-trailer combinations; and (3) truck-trailer combinations. 26 C.F.R. § 41.4482(b)-1(d).

This schedule, as interpreted by the Commissioner of the Internal Revenue Service (Commissioner), categorizes as single units those trucks designed for the transportation of property, which are not equipped to tow a trailer or semitrailer of the type that forms a "combination" when coupled with a truck. If a vehicle is classified as a single unit, no use tax is imposed if its actual unloaded weight is less than 13,000 pounds. Further, where the actual unloaded weight is 13,000 pounds or more and the vehicle is classified as a single unit, the use tax is less than the tax imposed under either the tractor-trailer combination category or the truck-trailer combination category, presumably because there is less wear and tear on the highways. 26 C.F.R. § 41.4482(b)-1(d).

The truck-trailer combination category includes any truck designed primarily for the transportation of property, and which is equipped for towing trailers or semitrailers of the type that form a combination when coupled with a truck, if trucks of the same type, when so equipped, are *customarily used* to tow such trailers or semitrailers. Under the schedule covering truck-

trailer combinations, no use tax is imposed if the actual unloaded weight of the vehicle is less that 9,000 pounds. However, annual use taxes are imposed on a "2 axled truck with actual unloaded weight of 9,000 pounds or more and less than 12,000 pounds and equipped for use in combinations," and on a "2 axled truck with actual unloaded weight of 12,000 pounds or more and equipped for use in combinations." 26 C.F.R. § 41.4482(b)-1(d). *See* Rev. Rul. 75-297, 1975-2 C.B. 443; and Rev. Rul. 76-558, 1976-2 C.B. 360.

The portion of this "taxable gross weights" schedule, set out in the treasury regulations and specifically relied on by the defendant in this section, reads as follows:

> 3. *Truck-Trailer Combinations:*
>
> (p) 2 axled truck with actual unloaded weight of 9,000 pounds or more and less than 12,000 pounds and *equipped for use in combinations.* (Emphasis added.)

26 C.F.R. § 41.4482(b)-1(d). It is this language, contained in a subordinate schedule included within the treasury regulations, upon which the Government wholly relies in supporting its claim that the plaintiff's trucks should be taxed as truck-trailer combinations, rather than as single units. Contrary to the assertions of the Government, however, neither the language of the statute nor its legislative history supports this position.

The defendant argues, in its motion for summary judgment, that Sections 4481 and 4482 *do not* require a factual inquiry into whether trailers are customarily used in connection with trucks of the types owned by the plaintiff. Rather, the defendant argues that the required inquiry into whether particular trucks are of the type with which trailers are "customarily used" has been previously undertaken by the Secretary in promulgating the treasury regulations, set out

above, pertaining to I.R.C. §§ 4481 and 4482. In support of its interpretation of the statute, the defendant observes that Congress delegated to the Secretary the authority to use "formulas or other methods for determining the taxable gross weight of vehicles by classes, specifications, or otherwise." 26 U.S.C. § 4482 (b). Pursuant to this grant of authority, the defendant asserts. the Secretary created three classes of motor vehicles subject to the highway use tax: (1) single unit vehicles; (2) tractor-trailer combinations; and (3) truck-trailer combinations. Falling within the latter two categories are trucks with which heavy-duty trailers are customarily used. As a result, the defendant's argument continues, the Secretary, having created classes of highway motor vehicles with which semitrailers and trailers are customarily used, determined that certain factors would cause the inclusion of particular trucks in one of the above three classes. These factors are: (1) the weight of the truck, and (2) whether the truck is equipped to tow heavy-duty trailers (*i.e.,* whether it is "equipped for use in combinations"). Thus, the defendant argues that the Secretary has already undertaken the necessary inquiry into whether a truck is of the "type" with which heavy-duty trailers are "customarily used." Therefore, the defendant asserts that no further inquiry, into whether a particular type of truck is customarily used to tow heavy-duty trailers, is necessary.

Under the Government's argument, a taxpayer is not permitted to demonstrate that its trucks are not of a type customarily used in combination with trailers. Instead, the taxpayer is subjected to an irrebuttable presumption under which its trucks are taxed without regard to their customary usage. As long as the trucks involved are within the weight categories set out in Treas. Reg. § 41.4482(b)-1(d) and are equipped for use in combination with heavy-duty trailers (i.e. equipped with pintle hooks), the IRS argues that that is sufficient to impose the highway use tax, without any regard to

whether the vehicle is customarily used in combination with heavy-duty trailers. However, this Court finds that the Government's position directly conflicts with the language of sections 4481 and 4482, with the language of the Government's own regulations and interpretations, and with prior judicial determinations.

The plaintiff, in opposing the defendant's motion, argues that the classification of its trucks as truck-trailer combinations was arbitrary and contrary to statute. Specifically, the plaintiff argues that sections 4481 and 4482 *require* that a truck may not be classified as a truck-trailer combination unless a factual inquiry reveals that, on an industry-wide basis, vehicles of the type in question are customarily used in combination with trailers. The plaintiff asserts that it does not "customarily use" its trucks to tow heavy-duty trailers and that the mere fact that its trucks are "equipped for use in combination" with such trailers does not warrant their being classified as truck-trailer combinations. It thus asserts that is should be allowed to factually rebut the Government's classification of its vehicles by proving which of its vehicles are customarily used in combination with heavy-duty trailers.

In response, the Government has stated that the customary use of trucks and trailers is indeed relevant, but it argues that the "customarily used" test applies to the *trailers,* rather than to a particular type of vehicle. The Government's construction of the statute is illustrated by its hypothetical example in which it concludes that a trailer which is used only 10 days out of the 300 total days that a truck is operated is nevertheless "customarily used" with that vehicle. At oral argument on this matter, the Government stated that such a determination rests upon its interpretation of the statutes and the regulations that, regardless of the extent of the trailer's usage, *any* usage establishes its "customary use" with trucks of the type in question. In short, if a trailer is towed but once a year by a particular truck, such one-time use becomes, under the Government's definition, the

customary usage contemplated by the highway use tax statutes and regulations, and the pintle hook equipped trucks should be taxed as if they all were customarily used in combination with the single trailer.

However, the Government's position completely ignores the underlying theory upon which highway use taxation is premised. In basing the relative amount of the tax upon the concept of gross vehicle weight, Congress sought to directly correlate the burden of the tax with the physical burden which the type of vehicle in question would presumably place upon the highways. If a vehicle customarily tows a trailer, then it is reasonable to include the weight of the trailer, together with the weight of its customary load, in the computation of the vehicle's taxable gross weight, since the latter would represent a fair determination of both the typical weight of the vehicle and its physical wear and tear upon the highway. Accordingly, the focus of the highway use tax is squarely upon the assumed weight of the vehicle, and, as such, only trailers which are customarily towed by such trucks can logically be combined with the weight of the trucks themselves. This interpretation of the highway use tax is confirmed by the Treasury Regulations which expressly state that "the base of the tax" is the gross weight of the vehicle, not the weight of the trailer, and that the weight of the trailer is only included in the gross weight of the vehicle when the trailer is customarily used in combination with that particular type of highway motor vehicle. 26 C.F.R. § 41.4482(a)-1(b).

Moreover, the Government's own documents reveal that the IRS had originally adopted the same position as the plaintiff herein (*e.g.*, a reasonable interpretation of the customary use standard). A "Conference Memorandum," dated April 25, 1957, obtained by counsel in the *L. E. Myers Co.* companion case pursuant to a request under the Freedom of Information Act, 5 U.S.C. § 552, documents a meeting of upper echelon representatives of the Treasury Department and of the

IRS to discuss application of the highway use tax provisions to utility trucks, such as those owned by the plaintiff herein. The meeting's discussion centered on two significant issues. The first issue involved the meaning to be ascribed to the phrase "equipped for use in combinations," contained in the Treasury's own regulations. The second issue involved a discussion of whether or not trucks of the type described therein should be taxed as combination units merely because they are equipped with a pintle hook. In answer to these questions, the conference attendees concluded:

> On the first question, the group noted that *the Use Tax Regulations contain no definition of the expression "equipped for use in combinations".* This being the case, *a rule of reason can be, and should be, applied in our interpretation of the expression.* Thus, a utility truck equipped with a body especially designed for the transportation of men, tools, and equipment needed in the construction, maintenance, and repair of telephone lines, gas lines, and the like *should not be considered as "equipped for use in combinations" merely because the truck is equipped with a pintle hook or other coupling device.* (Emphasis supplied.)

Shortly thereafter, in Rev. Rul. 57-547, 1957-2 C.B. 789, the Government recognized the unreasonableness of interpreting the phrase "equipped for use in combinations" as requiring the classification of a vehicle as a combination unit based solely on the presence of a pintle hook. As a result, the IRS stated that a utility truck of a type "designed for transportation of personnel, tools, and equipment, such as those used by public utility companies in the maintenance and installation of poles, lines, pipe conduits, etc., which is equipped with a pintle hook or similar coupling device for pulling a pipe or pole dolly, tool or equipment trailer, or other similar lightweight trailer, is not 'equipped for use in combinations.' " On the basis of this ruling, the IRS classified utility trucks, equipped with a pintle hook, as single units for purposes of reporting federal highway use tax liability. Moreover, the IRS's own publications

informed taxpayers that utility trucks were not taxable as combination units. *See* Federal Highway Use Tax on trucks, truck-tractors and buses, IRS Publication 349 (Rev. May 1973) (all utility trucks designed to transport personnel, tools, and equipment * * * are considered single units even though they are equipped with a pintle hook or similar coupling device for occasionally pulling dollies, equipment trailers, or other lightweight trailers).

In Rev. Rul. 75-297, 1975-2 C.B. 443, the IRS interpreted the use tax schedule, contained in Treas. Reg. § 41.4482(b)-1(d), as follows:

> Section 41.4482(b)-1(d) of the Highway Motor Vehicle Use Tax Regulations prescribes a schedule of taxable gross weights for different categories of vehicles for the period after June 30, 1969. Among the categories shown in the schedule are "single units" and "truck-trailer combinations."
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> * * * *
>
> For purposes of the tax imposed by Section 4481 of the Code, a truck equipped for use in a truck-trailer combination is one that is equipped for use *and is of the type customarily used in towing semitrailers or trailers of the type intended by the term "combinations," as used in the use tax schedule.* This term is not specifically defined in the regulations and should, therefore, be given its ordinary and usual meaning in the trucking industry. Rev. Rul. 72-109, 1972-1 C.B. 351. (Emphasis added.)

1975-2 C.B. at 443-44. As the above-quoted provision of Rev. Rul. 75-297 clearly demonstrates, the IRS continued through 1975 to interpret the phrase "equipped for use" to include the requirement that the truck not only be equipped for use in combination, but also be "of the type customarily used in towing" trailers.

Similarly, the requirement that a vehicle must, in fact, be of a type which is customarily used to tow trailers before being properly classified as a truck-trailer combination is confirmed

by the IRS's statements in both Rev. Rul. 76-558, 1976-2 C.B. 360, and Rev. Rul. 74-539, 1974-2 C.B. 376. Rev. Rul. 76-558 states, in pertinent part, that:

> In the truck-trailer combination category is any truck designed primarily for the transportation of property, and which is equipped for towing trailers or semitrailers of the type that form a combination when coupled with a truck, *if trucks of the same type, when so equipped, are customarily used to tow such trailers or semitrailers.* (Emphasis added.)

1976-2 C.B. at 361. Rev. Rul. 74-539 also states the same rule:

> In the instant case, the dump trucks are equipped to tow large-capacity combine trailers * * *. *Since trucks of this type, so equipped, are customarily used with trailers of the type intended by the term combinations, the dump trucks are truck-trailer combinations for purposes of the use tax schedule.* (Emphasis added.)

1974-2 C.B. at 376-77.

In Rev. Rul. 76-294, 1976-2 C.B. 364, the IRS attempted to reverse Rev. Rul. 57-547 and to adopt the position that the mere presence of a pintle hook permitted the classification of a vehicle as a combination unit. In this ruling, the IRS took the position that trucks, used by utilities which were equipped with pintle hooks, were to be taxed as truck-trailer combinations, rather than as single units. Specifically, Rev. Rul. 76-294 stated that one-axle trailers, having a gross vehicle weight of less than 6,000 pounds, are not "equipped for use in combinations." However, utility trucks equipped with pintle hooks capable of towing heavy-duty trailers are to be taxed as truck-trailer combinations, without regard to whether that type of truck is customarily used with heavy-duty trailers. It is interesting to note, however, that even Rev. Rul. 76-294 seems to indicate that the mere presence of the pintle hook does not mandate truck-trailer combination classification. In particular, Rev. Rul. 76-294 states that:

> In the truck-trailer combination category is any truck designed primarily for the transportation of property, and

> which is equipped for towing trailers or semitrailers of the type that form a combination when coupled with a truck, *if trucks of the same type, when so equipped, are customarily used to tow such trailers or semitrailers.* (Emphasis added.)

1976-2 C.B. at 365.

Further, the General Counsel Memorandum (GCM)[5] relating to Rev. Rul. 76-294 stated that:

> An emphasis on the hitches may leave the misleading implication that how a truck is equipped is determinative in classifying a vehicle as either a single unit or a truck-trailer combination for purposes of the highway use tax. By emphasizing the trailers customarily used by trucks of the same type, so equipped, the proposed revenue ruling will conform to G.C.M. 35261 * * * I-5047 (March 7, 1973), and G.C.M. 35826 * * * I-5047 (May 20, 1974).

GCM 36241 (April 18, 1975). Accordingly, Rev. Rul. 76-294, as finally promulgated, stated the rule that the truck-trailer combination category includes any truck which is equipped for towing trailers of the type that form a combination when coupled with a truck "if trucks of the same type, when so equipped, are customarily used to tow such trailers * * *." Note

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[5] GCM's are legal memoranda prepared by the Chief Counsel of the IRS, pursuant to requests for legal advice from the Assistant Commissioner (Technical), in connection with proposed private letter rulings, technical advice memoranda, and revenue rulings. They are maintained by the Chief Counsel and are "frequently cited in subsequent GCM's to insure consistency, avoid duplication of research, provide a reference source, and update earlier memoranda when a position on an issue is sustained, modified, or changed within the Office of Chief Counsel." *Taxation With Re presentation Fund v. Internal Revenue Service,* 80-1 U.S.T.C. ¶ 9163 (D.D.C. 1980), *aff'd and remanded on another issue,* 81-1 U.S.T.C. ¶ 9252 (D.C. Cir. 1981). GCM's thus state current Internal Revenue Service policies and interpretations with respect to legal issues. *Falcone v. Internal Revenue Service,* 479 F. Supp. 985 (E.D. Mich. 1979).

again that, according to GCM 36241, the customary use standard is still to be employed in any IRS determination.

Moreover, the GCM relating to Rev. Rul. 76-294 is only one of a series of nine GCMs, issued from June 19, 1958, through March 16, 1978, which have concluded that the "customary use" standard must be applied before reference can properly be made to the use tax schedule to determine taxable gross weight.[6] Further, the IRS has promulgated thirteen revenue rulings, from 1957 to 1978, which have followed the statutory "customary use" test in determining whether vehicles should be classified as single units or as truck-trailer combinations.[7] Even in recently changing its published position regarding the effect of pintle hooks, the IRS acknowledged that:

> A number of G.C.M.s discuss the proper method of classifying vehicles as single units or as truck-trailer com-

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[6] These GCMs, and the Revenue Rulings to which they relate, are as follows:

GCM	Date	Revenue Ruling
30742	June 19, 1958	60-260
32881	July 20, 1964	(not given)
34603	September 9, 1971	72-109
35261	March 7, 1973	74-539
35262	March 7, 1973	74-426
35826	May 20, 1974	74-539
36241	April 18, 1975	76-294
37339	December 2, 1977	78-156
37463	March 16, 1978	(not given)

These GCMs are currently not in the public domain, but they are discussed in GCM 38962, *supra,* which revokes many of these GCMs and modifies the others.

[7] Rev. Rul. 57-547, 1957-2 C.B. 789; Rev. Rul. 60-260, 1960-2 C.B. 347; Rev. Rul. 72-109, 1972-1 C.B. 351; Rev. Rul. 74-539, 1974-2 C.B. 376; Rev. Rul. 74-461, 1974-2 C.B. 377; Rev. Rul. 74-513, 1974-2 C.B. 377; Rev. Rul. 75-297, 1975-2 C.B. 443; Rev. Rul. 76-558, 1976-2 C.B. 360; Rev. Rul. 76-559, 1976-2 C.B. 365; Rev. Rul. 77-36, 1977-1 C.B. 347; Rev. Rul. 78-156, 1978-1 C.B. 365; Rev. Rul. 78-208, 1978-1 C.B. 366; Rev. Rul. 78-314, 1978-2 C.B. 269.

binations. The G.C.M.s state that in order to classify a particular vehicle as a taxable trucktrailer combination, *there must first be an evidentiary finding that on a nationwide basis, trailers are customarily used with the type of truck in question.* * * * * * G.C.M. 30742, A-626788 (June 19, 1958), pertaining to Rev. Rul. 60-260, 1960-2 C.B. 347, points out that while the words "customarily used" with reference to semitrailers and trailers appear not (only) in sections 4481(a) and 4482(b), but also in Treas. Reg. §§ 41.4482(a)-1 and 41.4482(b)-1, the words "equipped for use in combinations" appear only in the use tax schedule. The G.C.M. concludes, therefore, that it must first be determined whether trailers are "customarily used" with the type of truck in question. Only after that determination is made, is the use tax schedule consulted to determine the taxable gross weight.

* * * *

In light of the foregoing *we are hereby reversing our prior position* and adopting the position that the taxability of a vehicle as a truck-trailer combination rests solely on whether or not the vehicle is equipped to tow semitrailers or trailers. Accordingly, the following G.C.M.s are revoked: * * * * * G.C.M. 30742, A-626788 (June 19, 1958); * * * * * G.C.M. 32881, I-1192 (June 20, 1964); * * * * * G.C.M. 35261, I-5047 (March 7, 1973) and G.C.M. 35826, I-5047-72 (May 20, 1974); and * * * * * G.C.M. 36241, I-436-74 (April 18, 1975). In addition, to the extent they conclude that an evidentiary customary-use test is to be applied in determining whether a particular vehicle is a truck-trailer combination, the following G.C.M.s are modified: *Technical Study Project 68-40,* G.C.M. 34603, I-4208 (Sept. 9, 1971); * * * * * G.C.M. 35262, I-5117 (March 7, 1973); * * * * * G.C.M. 37339, I-368-76 (Dec. 2, 1977); and * * * * * G.C.M. 37463, I-5-77 (March 16, 1978). (Emphasis added.)

GCM 38962, CCH *IRS Positions Rep.* ¶ 1164-65 (February 16, 1983).

The Government argues against the plaintiff's use of the above-discussed revenue rulings in that each addressed a

problem different from the issue raised in this case. For example, in Rev. Rul. 75-297, the trucks in question were described as trucks with at least two axles and with actual unloaded weights of at least 9,500 pounds. All of the trucks are "equipped with hitches specially designed to tow lightweight portable grain elevators weighing about 1,100 pounds." The question addressed was whether those trucks fell within the "single unit" or "truck-trailer combination" category. Particularly, Rev. Rul. 75-297 explains that:

> (A) truck equipped for use in a truck-trailer combination is one that is equipped for use and is of the type customarily used in towing semitrailers or trailers of the type intended by the term "combinations," as used in the use tax schedule. This term is not specifically defined in the regulations and should, therefore, be given its ordinary and usual meaning in the trucking industry.

1975-2 C.B. at 444. The ruling goes on to state that lightweight portable grain elevators are not of the type ordinarily and usually considered as forming a "combination" when coupled with a truck and that trailers which do form such "combinations" are of a heavier weight. Therefore, since similarly equipped trucks of this type "are not customarily used with trailers of the type intended by the term combinations, (*i.e.*, they are not equipped for use in "combinations") the trucks are not truck-trailer combinations for purposes of the highway use tax schedule, but fall instead within the single unit category." The Government, however, cannot escape the ruling's express use of the "customary use" standard.

The Government, while conceding that the language contained in the revenue rulings was "ill-chosen," "inartfully worded," and "not well-chosen by the drafters," argues that such language must be analyzed for consistency with the statute. Therefore, the Government argues that the only issue addressed in each of the above revenue rulings was whether the trailers in question were heavy-duty trailers and therefore of a type which would subject the corresponding truck to "truck-

trailer" combination status. While this Court recognizes that each of the above revenue rulings addresses both the weight and the capacity of the trailer issues, it notes that all of the above revenue rulings contain express language flatly stating that the customary usage of the truck, with heavy-duty trailers, must be present as a condition to "truck-trailer" combination classification. As a result, this Court finds that the plaintiff's interpretation of the above revenue rulings is reasonable in light of the language used by the IRS and that it has a right to rely on them as long-established practice. The Court agrees with the plaintiff that this "ill-chosen" language accurately expressed the pre-1984 state of the law. Only now, almost twenty years later, in its attempt to rewrite history, does the Government decide that its earlier language was "inartful."

Further, the Government argues that the plaintiff's reliance on these past "inartfully worded" revenue rulings is misplaced, since they failed to address the "customary use" issue. As a result, the Government relies on Rev. Rul. 76-294 as controlling, since it merely "clarified the ambiguities arising out of Rev. Rul. 57-547 and upheld the IRS's use of the "equipped for use" test. However, the effect of Rev. Rul 76-294, on Rev. Rul. 57-547, was stated by the IRS as follows in Rev. Rul. 76-294:

> Rev. Rul. 57-547 is *modified* to state the position on utility trucks equipped with pintle hooks or similar coupling devices to tow heavier trailers. (Emphasis supplied.)

In using the word "modified," rather than the word "clarified," the IRS clearly indicates that it is changing its position from that originally set forth in Rev. Rul. 57-547. If the holding of Rev. Rul. 76-294 was consistent with Rev. Rul. 57-547, the IRS undoubtedly would have used the word "clarified," rather than the word "modified," to describe the effect of Rev. Rul. 76-294. The fact that the IRS considered it necessary to announce a change of position supports the plaintiff's justifiable reliance on Rev. Rul. 57-547 with respect to the matter at issue herein.

Accordingly, the statutes and the regulations, adopted in 1956, expressly incorporate the statutory "customary use"

standard, and both the revenue rulings and the GCMs, commencing in 1957 and continuing for nearly 20 years, uniformly enunciate the same "customary use" standard. These revenue rulings and GCMs constitute "a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent" and are entitled to particular force. *Corn Products Refining Co.* v. *Commissioner,* 350 U.S. 46, 52-53 (1955) (longstanding Treasury position in a published GCM given deference). As a result, the long history of the application of the highway use tax provisions supports the plaintiff's argument that it should not be subject to an irrebuttable presumption based merely upon the "equipped for use" standard.

It should also be noted that Congress re-enacted the highway use tax statutes in 1970, 1976, and 1978, without ever changing the customary use requirement.[8] Congress thereby appears to have implicitly ratified the IRS's interpretation of the highway use tax statutes and regulations, contained in its published revenue rulings and GCMs. As discussed above, the revenue rulings and the GCMs, on this issue, evidence a consistent and continuing administrative interpretation of the statutes and regulations which was known to the Congress and to the taxpayers. If Congress had disagreed with this interpretation, it could have removed the customary use test, from the statute, at any time.

It was not until the Highway Revenue Act of 1982, signed by the President on January 6, 1983, that an amendment was added to the highway use tax provisions that effectively enacted the Government's position enunciated in this case. On that date, the following language to the highway use tax provisions was added, as section 4482(c)(5):

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[8] Pub. L. No. 91-605, 91st Cong., 2d Sess. § 303(a)(7) (1970); Pub. L. No. 94-280, 94th Cong., 2d Sess. § 303(a)(7) (1976); Pub. L. No. 95-599, 95th Cong., 2d Sess. § 502(a)(6) (1978).

> (5) CUSTOMARY USE. A semitrailer or trailer shall be treated as customarily used in connection with a highway motor vehicle if such vehicle is equipped to tow such semitrailer or trailer.

This amendment adopts the "equipped-for-use" test urged by the Government, but does so only prospectively for periods beginning on or after July 1, 1984. As a result, after July 1, 1984, a particular type of truck may, in fact, never be used in conjunction with a trailer, but it will nevertheless be classified as a truck-trailer combination if it is equipped with a pintle hook or other similar coupling device enabling it to tow a trailer.

The very fact that the Treasury Department deemed it necessary to approach the Congress to amend the highway use tax provisions to adopt its "equipped for use" interpretation, and that the Congress deemed it such a significant change that it postponed its effective date for eighteen months, indicates that the law, until that date, required a determination that a truck is of a type customarily used in combination to tow trailers if it is to be taxes as a combination unit.

The issue presented in the instant case has not previously been addressed by this Court or by this Court's predecessor, the United States Court of Claims. Three federal courts of appeal have considered the issue, however, and have reached conflicting results. First, in *Pacific Gas & Electric Co.* v. *United States*, 664 F.2d 1133 (9th Cir. 1981), the Ninth Circuit held that utility trucks could not be classified as truck-trailer combinations merely because they were equipped with pintle hooks. In that court's view, the "customary use" standard is required by the clear and unambiguous language of the statutes and the treasury regulations, with the result being that any interpretation of the statute which would ignore the "customary use" standard is contrary to the statute and therefore invalid and of no effect. *Id.* at 1135-36. Particularly, the court stated that:

> The statute and the regulations make it clear that trailers are only to be included in the gross taxable weight of the truck if that type of trailer is customarily used with such type truck. Hence, *the requirement of such "customary use"* set forth in the statute and the regulations *requires a factual determination* of whether the type trailer is customarily used in connection with a motor vehicle of the same type as the motor vehicle (truck) of Pacific, *rather than an arbitrary finding that any truck equipped with a pintle hook is one customarily so used in combination.*
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> * * * *
>
> An interpretation of the statute or regulations which permits the Internal Revenue Service to classify a vehicle as a "truck trailer" combination merely because the vehicle is "equipped for use in combination" with trailers, such as equipped with a pintle hook, without first determining that such trailer or semitrailer is the type customarily used in combination with such vehicle is erroneous and any regulation permitting the same is contrary to the statute and therefore invalid and of no effect. (Emphasis added.)

Id. Accordingly, the Ninth Circuit reversed and remanded the case to the U.S. District Court for the Northern District of California for a factual determination as to whether "trailers and/or semitrailers are customarily used in connection with highway motor vehicles of the same type operated" by PG&E. *Id.* at 1136.

The district court, on remand, found that "customary use" requires that heavy-duty trailers be used with a particular type of truck more than fifty percent of the time. *Pacific Gas and Electric Co.* v. *United States,* 554 F. Supp. 345, 346 (N.D. Calif. 1983). Thus, the district court expressly rejected the Government's "customary use" argument in holding that:

> The government's position is untenable. It reduces the statutory language to a tautology, with the effect that a taxpayer who hauls a trailer once a year would have to pay the same tax as one who always hauls a trailer, for the reason that he "customarily" hauls the trailer but once. To

> adopt such a definition of customary use would be inconsistent with the mandate of the Ninth Circuit to avoid "arbitary finding(s)" of custom.

Id. at 346. As a result, while PG&E had various trucks "equipped" with pintle hooks, these trucks were not customarily used to pull heavy-duty trailers, and, as such, could *not* be taxed by the IRS as truck-trailer combinations.[9] *Id.* at 347.

After reviewing the reasoning undertaken by the district court in California, this Court beleives that that reasoning makes sense and that, if this case proceeds to trial in this Court, the statutory "customary use" requirement will be interepreted "as meaning more than fifty percent of the time." *Id.* at 346. Thus, if the plaintiff can establish that the subject vehicles were not used more than fifty percent of the time to haul heavy-duty trailers, the IRS's classification must be changed. This Court will focus its customary use determination on the vehicle, rather than on the trailer.

Second, the Eighth Circuit reached the opposite result in *Northern States Power Co.* v. *United States,* 503. F. Supp. 1182 (D. Minn. 1981), *aff'd,* 663 F.2d 55 (8th Cir. 1981), *cert. denied,* 456 U.S. 965 (1982), wherein the court ado pted the opinion of the U.S. District Court for the District of Minnesota, which had held that no factual determination of "customary use" is necessary. The Minnesota district court observed that "(t)he statute does not specify that the trailer actually be customarily used with the taxable vehicle, but only that the trailers be of the kind customarily used with that *type* of vehicle. No evidentiary showing that a particular taxpayer's vehicles are so used is required." *Northern States Power Co.* v. *United States,* 503 F. Supp. 1182, 1184 (D. Minn. 1981). Further, the

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[9] The district court found, however, that PG&E's line trucks, cable pullers, and underground heavy winch trucks were used more than fifty percent of the time with heavy-duty trailers.

district court observed that Congress delegated to the Secretary the broad authority to prescribe regulations for determining gross vehicle weights, and this promulgation of regulations which apply the "equipped for use" standard as a means of classifying vehicles in the truck-trailer category was therefore within his discretion. *Id. See also Public Service Co. of Colorado* v. *United States,* No. 80-M-660 (D. Colo. Oct. 25, 1982).

Finally, the Seventh Circuit, in a split two-to-one decision, endorsed the Eighth Circuit's decision in *Northern States Power Co.* v. *United States, supra,* by upholding the IRS's "equipped for use" test as a reasonable exercise of the Secretary's discretion. *Northern Illinois Gas Co.* v. *United States,* 554 F. Supp. 371 (N.D. Ill. 1983), *aff'd,* 743 F.2d 539 (7th Cir. 1984). In so holding, the circuit court stated that:

> We find that the Secretary's "equipped for use" standard is a reasonable implementation of the "customarily used" standard contained in the statute. It is not unreasonable to assume that vehicles are equipped for use with heavy trailers for the purpose of using them with heavy trailers. Thus, it was not unreasonable for the Secretary to rule that a vehicle equipped for use with a heavy trailer is, for the purposes of section 4481, a type of vehicle customarily used with a heavy trailer. It may be, as the appellants contend, that many vehicles that are equipped for use with heavy trailers are not customarily used with heavy trailers. However, in permitting the Secretary to create general classifications to be used in determining taxable gross weight in particular cases, Congress clearly was not insisting on accuracy in every case. Rather, it was acknowledging implicitly that formulas and classifications that may be overbroad or underbroad are often necessary to the efficient administration of a tax collection system.

743 F.2d at ____. Judge Pell, however, in his dissent, adopted the Ninth Circuit's decision in *Pacific Gas and Electric Co.* v. *United States, supra,* as correctly resolving this issue. Specifically, Judge Pell stated that:

> Congress imposed a tax on the use of highways. Logically the intent of Congress was that the highway use tax bear most heavily on those whose use of the highway caused the most wear and tear. Imposing the tax on those types of trucks that are customarily used with heavy trailers is a reasonable method of determining which types of trucks should bear the burden of the tax. The customary-use test is not a fine-tuned means of apportioning the burden of the use tax, but it is related to the actual use of the highways by a type of truck. The equipped-for-use test, in contrast, is inconsistent with Congress's attempt to apportion the tax equitably. The equipped-for-use test is not reflective of the actual use of heavy trailers. A pintle hook, by itself, causes no additional wear on a highway. As the evidence appellant attempted to introduce demonstrates, utility trucks equipped with pintle hooks more often than not are *not* used in combination with heavy trailers.

Id. at ____.

Notwithstanding both the decision of the Eighth Circuit, in *Northern States Power Co., supra,* and the split decision of the Seventh Circuit, in *Northern Illinois Gas Co., supra,* in which both held in favor of the Government, this Court believes that the Ninth Circuit's decision, in *Pacific Gas and Electric Co., supra,* is the more well reasoned decision in light of the above discussion. In addition, this Court would note two further matters which serve to detract from the precedential value to be accorded the decisions of both the Eighth Circuit and the Seventh Circuit. First, the Eighth Circuit decision adopted the reasoning of the initial decision of the U.S. District Court for the Northern District of California in granting the Government's motion for summary judgment, prior to the decision being reversed by the Ninth Circuit. *Pacific Gas and Electric Co.* v. *United States,* No. C-79-0596-WWS (N.D. Calif. Jan. 22, 1980). Subsequent to the *Northern States Power Co.* decision, the Ninth Circuit reversed the decision of that district court, and, on remand, the same district court concluded, as discussed above, that the statutory "customary use" test is not

equivalent to the IRS's "equipped for use" test. Second, the weight to be accorded the Seventh Circuit's decision is somewhat diluted in that the appellate panel was composed of two Seventh Circuit judges and one Eighth Circuit judge sitting by designation. The Seventh Circuit judges split over the issue discussed herein, with Judge Flaum adopting the Eighth Circuit's decision and with Judge Pell adopting the Ninth Circuit's decision. Judge Henley, of the Eighth Circuit, formed the majority by voting in favor of adopting his own circuit's prior interpretation.

In addition, this Court's predecessor's decision in *North American Van Lines, Inc.* v. *United States,* 144 Ct. Cl. 641, 169 F. Supp. 252, *cert. denied,* 359 U.S. 1011 (1959), contrary to the Government's assertions, lends no support to the Government's contention that the statutory "customary use" standard may be ignored. In that case, the taxpayer actually used trailers in combination with its trucks and did not dispute the classification of its vehicles as "truck-trailer" combinations. *North American Van Lines, Inc., supra,* 144 Ct. Cl. at 644-45, 169 F. Supp. at 254. Instead, the taxpayer challenged the authority of Congress and of the Secretary of the Treasury to determine the taxable gross weights of the maximum loads carried on its trailers with reference to the customary weights of such loads, rather than the actual weights carried on the taxpayer's trailers. *Id.* The Court of Claims found that there was no constitutional impediment to the imposition of the tax based upon customary or assumed weights and that the treasury regulations, which fairly and accurately specified average maximum load weights, were consistent with the taxing statutes and therefore reasonable. *North American Van Lines, Inc., supra,* 144 Ct. Cl. at 646-47, 169 F. Supp. at 255-56. As a result, the *North American Van Lines* court held that, where a trailer is customarily used in combination with a particular type of vehicle, the weights assigned to the loads carried thereon (as well as the trailers themselves) may properly be determined in accordance with the customary or average industry weights. *Id.* It does not

in the least suggest, however, that a vehicle may be taxed as a "truck-trailer" combination when vehicles of the same type are not customarily used in combination with a trailer.

Further, the government's reliance on *Dickman v. Commissioner,* ____ U.S. ____, 104 S. Ct. 1086, 79 L.Ed.2d 343 (1984), is misplaced. In *Dickman,* the U.S. Supreme Court addressed an alleged departure by the IRS from its prior administrative construction of the gift tax statutes and regulations. As a result of the broad scope of the language contained in the gift tax regulations, the Court noted that the gift taxability of interest-free loans was "not without a reasonable and well-established foundation." *Dickman* v. *Commissioner, supra,* ____ U.S. at ____, 104 S. Ct. at 1094, n.11, 79 L.Ed.2d at 354, n.11. However, in the instant case, the Commissioner's action is neither consistent with the "customary usage" test set out in section 4481, nor with the applicable regulations set out thereunder, nor with the revenue rulings issued contemporaneously with such regulations. Thus, the Commissioner cannot support his action as merely "changing his interpretation." In fact, the Commissioner's position in this case appears to this Court to represent an attempt to change the highway use tax provisions without Congressional action or approval.

It is axiomatic that in order for the IRS's regulations to be valid that they must not be inconsistent with the statutory provisions. In *Manhattan General Equipment Co.* v. *Commissioner of Internal R evenue,* 297 U.S. 129, 134 (1936), the U.S. Supreme Court noted that:

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress — but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. And not only must a regulation,

> in order to be valid, be consistent with the statute, but it must be reasonable. (Citations omitted.)

See United States v. *Larionoff* , 431 U.S. 864, 873 (1977) (regulations, in order to be valid, must be consistent with the statute under which they are promulgated); *Mohasco Corp.* v. *Silver,* 447 U.S. 807, 825 (1980) (an agency's interpretation of the statute cannot supersede the language chosen by Congress). *See also General Electric Co.* v. *Gilbert,* 429 U.S. 125 (1976); *Security and Exchange Comm.* v. *Sloan,* 436 U.S. 103 (1978).

Recently, in *Thomas International Ltd.* v. *United States,* No. 449-81T, slip op. at 9-10 (Cl. Ct. Oct. 12, 1984), this Court held that:

> As a general matter the regulations of an administrative agency charged with the duty to carry out a congressional mandate are entitled to great weight; but this general principle of deference only sets the framework for judicial analysis and does not displace it. *United States* v. *Vogel Fertilizer Co.,* 455 U.S. 16, 24 (1982). It is hornbook law that the Treasury has no power to promulgate a regulation which either adds an exception to or supplies an omission in a statute which it believes Congress should have included but did not. *Commissioner* v. *Acker,* 361 U.S. 87 (1959); *Helvering* v. *Credit Alliance Corp.,* 316 U.S. 107, 113 (1942); *Caterpillar Tractor Co.,* 218 Ct. Cl. at 526, 589 F.2d at 1045; *Durbin Paper Stock Co.* v. *Commissioner,* 80 T.C. 252, 261 (1983).

It necessarily follows that a published revenue ruling, which is inconsistent with the Internal Revenue Code, must likewise be regarded as "a mere nullity." *Idaho Power Co.* v. *Commissioner,* 477 F.2d 688 (9th Cir. 1973), *rev'd on other grounds,* 418 U.S. 1 (1974); *First National Bank of Midland, Texas* v. *United States,* 423 F.2d 1286 (5th Cir. 1970). Therefore, since Rev. Rul. 76-294 mandates the application of the "equipped for use" standard, rather than the "customarily used" standard expressly required by sections 4481(a) and 4482(b) of the statute, it must be deemed to be a mere nullity.

In adopting this standard, the ruling completely ignores the possibility that trucks, of the type involved herein, may not be customarily used with any semitrailer or trailer.

Moreover, although the Government raises the Pandora's box "horror" of a trial on the merits of "customary use," both in this case and in a potential avalanche of cases still administratively pending, it must be noted that its assessment is presumptively correct, and it is the taxpayer, not the Government, who must carry the burden of proving that its vehicles are not of the type which the Government considers them to be. If the taxpayer is unable to prove that its vehicles are not of a type customarily used in combination with a trailer, then the assessment of additional highway use taxes will be upheld. However, if the taxpayer can prove that its vehicles are not of a type customarily used in combination with a trailer, then there can be no basis for assessment of the additional taxes, since the taxpayer would have established the absence of the statutory pre-condition to imposition of such additional taxes.

If this Court is correct in its reading of the applicable law and treasury regulations, the plaintiff, and similarly situated taxpayers, has the right to contest its highway use tax assessments regardless of the administrative burden placed on the IRS, the litigation burden placed on the Department of Justice, or, for that matter, the potential burden on the resources of this Court. As a result, the IRS's Pandora's box argument is entitled to little credence. If the IRS persists in its attempts to collect highway use taxes contrary to the authorizing legislation, the responsibility for opening the Pandora's box lies with the IRS.

In administering this tax, the IRS now relies on an irrebuttable presumption that a truck, which merely is equipped with a pintle hook, is in fact a truck of the type with which heavy-duty trailers are customarily used. The IRS has taken this position without offering any evidentiary support and without giving any consideration to the fact that the utilities may have equipped particular trucks with pintle hooks, not so that they may be used customarily to tow trailers, but so that

they may be so used only in the event of emergencies. In particular, the IRS has classified in this and the companion cases, for example, the following types of vehicles as highway motor vehicles which customarily haul heavy-duty trailers: dump trucks, aerial lift trucks, mobile cranes, digger derricks, and concrete mixers. While the evidence to be presented at trial may prove to the contrary, this Court, at this time, is hardpressed to conceive of the above types of vehicles customarily hauling heavy-duty trailers. As such, this Court finds the IRS's classification of those vehicles (*e.g.*, truck-trailer combination) to be facially absurd.

In *Heiner* v. *Donnan*, 285 U.S. 312 (1932), the United States Supreme Court held that a taxing statute which relied upon an irrebuttable presumption was unconstitutional. In so holding, the Court stated that "a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the (fifth) Amendment." *Id.* at 325.

In any case, while the Government may assure ease and certainty of administration for itself and for taxpayers asserting deficiencies, it stands the concept of administrative ease on its head to contend, as does the Government, that the presence of the pintle hook must also be dispositive of any judicial challenge by a taxpayer of the IRS's classification. In short, the Government, for administrative purposes, may view the pintle hook, or any other factor it may choose, as requiring classification as a "truck-trailer" combination. The Government, however, must nevertheless recognize the right of a taxpayer to its day in court and the opportunity of such taxpayer to prove that the elements of "truck-trailer" combination status are absent in a particular case. Such an approach more than adequately balances the Government's interest in administration of the tax laws with the taxpayer's right to prove that it does not owe the additional tax.

Therefore, this Court adopts the plaintiff's two-prong approach to the classification of vehicles for purposes of the

federal highway use tax provisions. Initially, for administrative convenience, the IRS can devise whatever classification formula it desires, within the parameters of section 4482(b). Here, the IRS has adopted the "equipped for use" standard as its classification standard. However, upon such administrative classification being challenged by a taxpayer on the basis of "customary use," the IRS must review its initial classification decision on the basis of whether the particular vehicles in dispute are customarily used in the manner so classified. If such review reveals that the taxpayer does not customarily use the subject vehicles in a manner consistent with the IRS's original classification, the IRS must reclassify the vehicles to reflect their customary use. Finally, if the taxpayer remains unsatisfied with the IRS's classification, he may seek judicial review of such classification. Under no circumstances, can this Court agree with the IRS that its administrative classification constitutes an irrebuttable presumption that neither the taxpayer can challenge nor this Court can review.

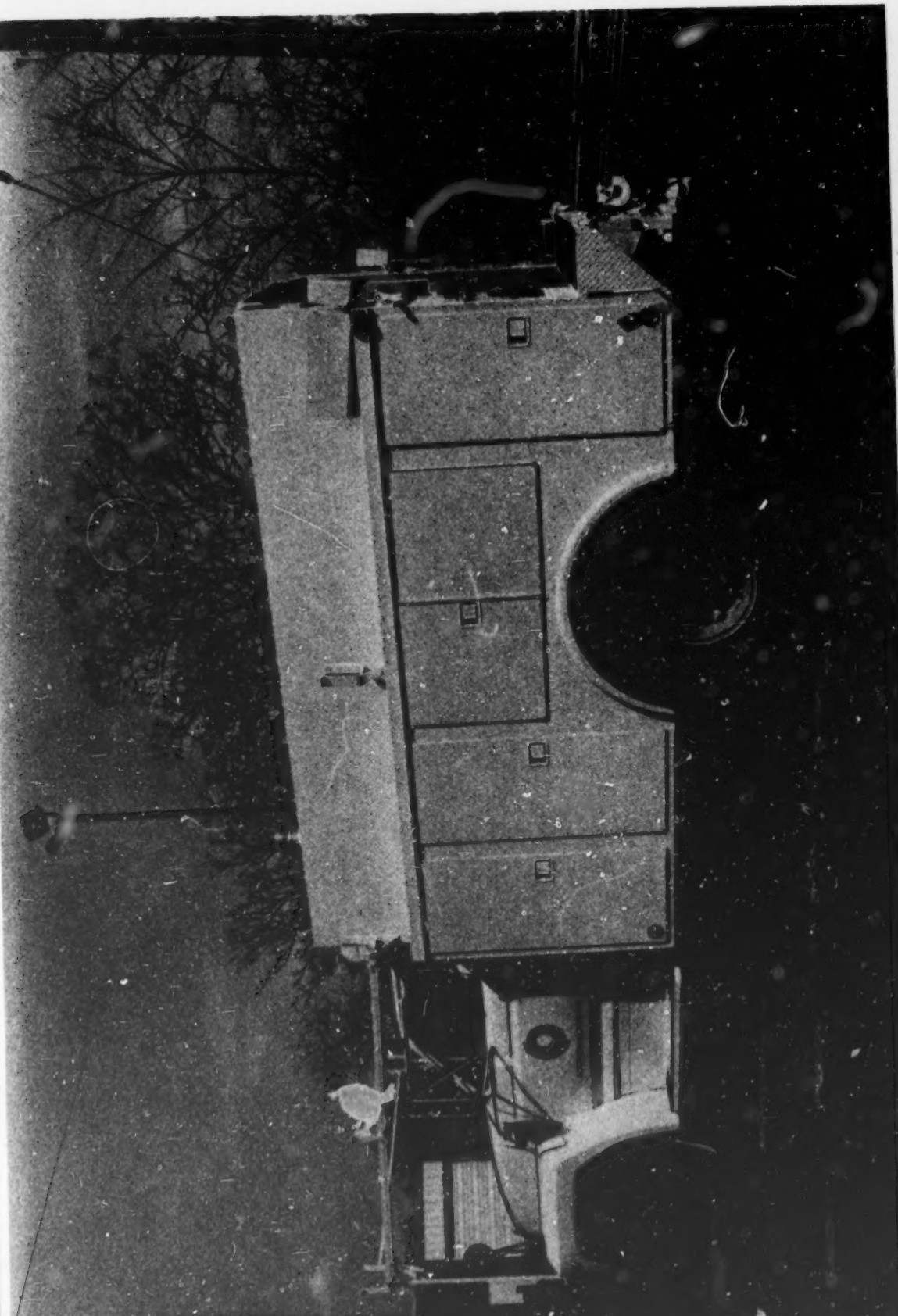
As the conflicting opinions of the three U.S. Courts of Appeal have made clear, reasonable minds can and do differ over this Court's view of the law in this matter and consequent denial of the defendant's motion for summary judgment in this case. Therefore, this Court believes that the issue presented herein, whether or not the taxpayer is entitled to a trial on the merits of customary use of its highway motor vehicles, involves a controlling question of law with respect to which there is substantial ground for difference of opinion, and that resolution of this question would materially advance the ultimate termination of the litigation. It also should be noted that this case is but one of eight cases that have already been filed in this Court (two are companion cases that have likewise been certified for review, and five are suspended awaiting this decision) and that many more cases could still be filed with this Court if this decision is not reversed. The monetary amounts potentially at

issue are also not inconsiderable. At oral argument, the plaintiff indicated that there were administratively pending some 262 cases raising this issue that involved some $6.4 million. As a result, this Court is of the opinion, pursuant to 28 U.S.C. § 1292(d)(2) (1982), that "a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation * * *," and future litigation.

CONCLUSION

For the reasons stated herein, the defendant's motion for summary judgment is denied. The plaintiff is entitled to a trial on the issue of customary use, under the standards to be applied as enunciated herein.

The Court further concludes and states, pursuant to 28 U.S.C. § 1292(d)(2), as amended by section 125(b) of the Federal Courts Improvement Act of 1982 (Pub. L. No. 97-164, 96 Stat. 25, 37), that there is involved in this interlocutory opinion a controlling question of law with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from this opinion would materially advance the ultimate termination of the litigation.



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